(1)

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOAN ROBERTS,
Petitioner

v.

TITUS COUNTY MEMORIAL HOSPITAL;
GEORGE BURNS, Director of Radiology,
Titus County Memorial Hospital;
GENE LOTT, Director of Human Resources,
Titus County Memorial Hospital

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

No. 1: Whether the "By-laws" of a local governmental entity that state, the administrator "may dismiss any employee for good cause and thereafter make a report to the Board of the dismissal", create employment due process rights over the general presumption of an "at will" status?

No. 2: Must a facial challenge to a local governmental policy in the employment context that is a prior restraint effectively condemning speech as a patient advocate and thereby associations with colleagues be judged upon its face, rather than the substantiality of the reasons advanced for the policy's purpose, in the absence of testimony of the specific speech supporting the charges against petitioner; accordingly, did the court properly apply the standard of review for a just determination?

No. 3: In *Waters v. Churchill*, 511 U.S. 661 (1994) this court determined the *Connick* test must be applied to the defendant's version of plaintiff's speech utilizing the *Waters'* reasonableness test when speech is in dispute.

In such a case, when the Hospital refused to come forth with specific, non-conclusory, information of the alleged speech as the employer thought it to be and facts of a reasonable investigation predating Petitioners firing, stating it would be asking them "to prove [plaintiff's] case"; accordingly, is justice served in a summary judgment proceeding to deny the truth of Petitioner's pleadings and apply the *Connick* test with ungoverned deference to the Hospital's generalized version and characterization of Petitioner's claims – standing alone – in a mock *Pickering* analysis purported to be a balance deserving of a constitutional right, or does the Hospital have the burden to come forth with facts to effectuate the *Waters* and *Connick* test to negate liability, or some other undefined procedure?

No. 4: In a freedom of speech pretext claim alleging retaliation for previous undisputed speech, what is the proper application of the *Connick v. Myers*, 461 U.S. 138 (1983) test – to which speech is the court to apply the *Connick* test? Does the court apply the *Connick* test to the prior speech for which Petitioner claims she was fired under the guise of the Code #6 & solicitation policies or is the *Connick* test applied to the disputed pretextual reasons, taken as true, as in the case at bar and thus, foreclose a *Pickering* analysis on the prior speech?

No. 5: In a challenge to a solicitation policy applied to Petitioner with alleged viewpoint discrimination in a non-public forum, where it is undisputed the policy was not uniformly enforced, the policy's purpose was not argued or implicated, the incidental restriction was greater than what was essential, and the restriction had the effect of silencing political speech in general; does the Petitioner need to prove the disputed non-speech element of the same speech act is a matter of public concern etcetera, when the Court found the speech element was a matter of public concern, yet cited no authority to support this precedent?

No. 6: In the *Pickering v. Board of Ed.*, 391 U. S. 563 (1968) analysis is the *potential* for disruptiveness to the Hospital's efficiency of treating patients to be met by admissible evidence carrying a "clear potential" as in *Connick v. Myers* and *Waters v. Churchill?*

No. 7: In a Title VII claim, is the Petitioner entitled to have the Court determine her prima facie case on the type claim pled, or as in the case at bar, does the Court rule on the type claim as the Hospital characterizes it; and accordingly, can Petitioner's hostile work environment claim be based on disparate treatment rooted in her Director's prejudice and sex based stereotyped set of beliefs and expectations and use supporting evidence of subjective and discretionary promotion systems of statistical disparity; and is the Court in conflict with itself that Title VII only addresses ultimate employment actions.

No. 8: What span of temporal proximity is sufficient to be presumptive of causation in a Title VII retaliation claim, since the Courts are in great conflict on this issue and are not state of mind issues supported by circumstantial evidence on pretext for the jury?

LIST OF PARTIES

In compliance with Rule 14 1 (b) of the Rules of the Supreme Court of the United States, all parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a private citizen and not a non-governmental corporation.

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REFERENCES

Dorland's Illustrated Medical Dictionary, W. B. Saunders Company
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The American Heritage College Dictionary, Houghton Mifflin Co.
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The American Heritage College Dictionary, Houghton Mifflin Co.
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The American Heritage College Dictionary, Houghton Mifflin Co.
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CITATIONS OF OPINIONS

The order and opinion of the Fifth Circuit on Appellant's appeal from the U.S. District Court for the Eastern District of Texas, Texarkana Division, is unpublished but appears in the Appendix at 1, *Roberts v. Titus County Memorial Hospital*, No. 04-41101 (5th Cir., April 14, 2005) . The order denying Appellant's Motion for Rehearing from the Fifth Circuit appears in the Appendix at 3.

The order and opinion on Defendant's Motion for Summary Judgment of the United States District Court for the Eastern District of Texas, Texarkana Division is unpublished but appears in the Appendix at 2, *Roberts v. Titus County Memorial Hospital*, USDC No. 5:03-CV-21-DF (July 22, 2004).

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered on April 14, 2005, affirming the Trial Court's judgment of Defendant's Motion for Summary Judgment. Petitioner's motion for rehearing was timely filed and overruled on June 1, 2005.

The U. S. Supreme Court has jurisdiction over Petitioner's Petition for Writ of Certiorari under Supreme Court of the United States Rule 10 (a) because this Court has entered a decision in conflict with the decision of another United States Court of appeals on the same important matter, or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the the Supreme Court's supervisory power; and under Rule 10 (c) because the Court of Appeals decided an important question of federal law that has not been, but should be, settled by the Supreme Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment of the United Stated Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const. Amend., [Article 1.] (1789)

The Fourteenth Amendment of the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Constitutional Amendment, Article XIV. (1868)

Title VII of the Civil Rights Act of 1964,
42 U. S. Code §2000e-2. Unlawful Employment Practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964,
42 U. S. Code §2000e-3. Other Unlawful Employment Practices.
(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The by-laws of the hospital provide in relevant part:
"The Board of Managers shall appoint, under terms prescribed by the Board, a general manager to be known as the Administrator of the hospital district. .... The Administrator shall perform all duties which may be required of him by the Board, and shall supervise all of the work and activities of the district and have general direction of the affairs of the district, within such limitations as may be prescribed by the Board. ... He shall supervise the work of all employees and shall assign to the employees their respective tasks and duties and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal." The By-laws are reproduced in full at Appendix 4 A. Titus Regional Medical Center Board of Managers Bylaws, Article XI - Administrator (adopted, April 2, 1990)

The hospital radiology departmental policy provides in relevant part:

1. The radiologic technologists conducts herself or himself in a professional manner, responds to patient needs and supports colleagues and associates in providing quality patient care.

5. The radiologic technologist assesses situations; exercises care, discretion and judgment; assumes responsibility for professional decisions; and acts in the best interest of the patient.

6. The radiologic technologist acts as an agent through observation and communication to obtain pertinent information for the physician to aid in the diagnosis and treatment of the patient and recognizes that interpretation and diagnosis are outside the scope of practice of the profession. (Adopted March 4, 2002).

The policy is reproduced in full at Appendix 4 B.

STATEMENT OF THE CASE

The District Court had jurisdiction over Plaintiff's claims because the action arose under the First Amendment and the Fourteenth Amendment (Section One) to the United Sates Constitution, for which redress is provided under 42 U.S.C. § 1983, being a Civil Action for Deprivation of Civil Rights; and also, under the United States Civil Rights Act of 1964, ("Title VII") Article 42 U.S.C. § 2000e (2) (3), being a Civil Action for Unlawful Employment Practices. Jurisdiction was conferred on the District Court under 28 U.S.C. § 1343 (a) (3) because Plaintiff's claims are civil actions authorized by law and federal question jurisdiction is conferred by 28 U.S.C. § 1331 because it is a civil action arising under the laws and Constitution of the United States. (3rd Am Pet)

Roberts was a CAT scan technologist in the radiology department of Titus County Memorial Hospital from 1986 to 2002 when she was terminated under the allegations of "soliciting employees and diagnosing patients' problems and giving medical advice". (App.

5 A). Roberts claims she was wrongfully fired and has substantive due process rights and may only be fired "for good cause" as stated in the hospital's organizational By-laws promulgated by the governing Board of Managers and accordingly, denied procedural due process with constitutionally adequate procedures. The issue of due process rest in whether the Hospital By-laws, a local provision with the force of law, prevail over the general presumption that Petitioner Roberts is an "at will" employee.

The Hospital challenged Roberts' due process claims without evidence, but contended the By-laws did not alter her "at will" status or entitle her to due process rights, accordingly the District Court found the "By-laws could not alter Plaintiff's employment status as and "at will" employee without reference to the By-laws in an employment contract." (App. 2 at 22). The Court of Appeals found the "By-laws could not alter Plaintiff's employment." (App. 1 at 4). Both Courts below cited as cases of authority, those relating to internal policies and not law; accordingly, the court is in conflict with *Legal Services Corp. v. Velazques, et. al.*, U. S. No. 99-603 (Feb. 2001) that "Judicial decisions do not stand as binding precedent for points were not raised, not argued, and hence not analyzed."?

March 5, 2002, the hospital officially announced to Roberts a newly adopted departmental policy in a documented counsel threatening termination, in relevant part, specifically known as Code #6. (App. 4 B). Hospital allegations against Petitioner are general in nature and do not disclose specific testimony upon which the charges rest, but state Roberts' speech violated Code #6, in that the "giving your opinion of CT scans to physician" and discussions of findings with physicians was out of her "scope of practice", as well as "discussing and/or advising a pt. regarding treatment". (App. 5 C). Petitioner requested specifics of these vague charges to no avail (App. 5 D). Upon termination, general conclusory allegations led Roberts to file a facial challenge, claiming Code #6 was a prior restraint that effectively condemned her and all technologist from speaking as a patient advocate and

accordingly infringed on her liberty to associate with colleagues due to the fact it was vague and standardless. (App. 5 X).

The Hospital first challenged Roberts' facial challenge of Code #6 in their Reply to the Response to Defendents Motion for Summary Judgment without evidence and simply contended that Roberts' challenge of Code #6 was not proper against the Hospital, and at oral argument, argued the stated purpose in implementing the policy in conjunction with Roberts' qualifications along with their version of interpretation of what the policy prohibited – specifically, the "interpreting of x-rays or CAT scan results or giving medical diagnoses". (App. 2 at 7).

Accordingly, the District Court found the policy "is not so 'vague or standardless' that is leaves radiologic technologist uncertain as to the conduct it prohibits" and "because people of ordinary intelligence understand that unqualified medical personnel should not interpret x-rays or CAT scan results, diagnose patients, or tell patients not to follow the advice of their doctor," the policy does not authorize or encourage arbitrary and discriminatory enforcement. (App. 2 at 8). The Court of Appeals affirmed the District Court ruling as a matter of law, stating that "diagnosing patients is the realm of physicians." (App. 1 at 5-6).

The issue of Roberts' facial challenge rest in whether the policy (Code #6) must be judged upon its face, rather than the substantiality of the reasons advanced for the policy's purpose, in the absence of testimony of the specific speech supporting the charges against petitioner; accordingly, did the court properly apply the standard of review for a just determination. The interest of the liberty of free discussions and public concerns calls upon this court to utilize its authority and clarify the standard of review for facial challenges to policies in the employment context that are based on general allegations in light of the ruling, "[t]he section in question must be judged upon its face", *Thornhill v. State of Alabama*, 310 U. S. 88, 97 (1940), and "[a] 'reasonable' burden on expression requires a justification far stronger than mere specula-

tion about serious harm", *U. S. v. National Treasury Employees Union*, No. 93-1170 (1995).

The Hospital, neither challenged nor argued Petitioner's alternative First Amendment claims with any evidence of the specific speech (general charges were alleged) for which Petitioner was fired, neither did the Hospital challenge with any evidence nor argue facts of an investigation prior to Petitioner's firing (App. 5 E). The Hospital stated in response to discovery request, "that Plaintiff is requesting Defendants to prove her lawsuit" when such information was requested. (App. 5 F). The Hospital moved for summary judgment on their characterization – not Petitioner's characterization – of the First Amendment claims. (App. 5 E).

Accordingly, for reasons the Hospital advanced, the District Court ruled in favor of the Hospital upon all Petitioner's claims as the Hospital chose to characterize them and the Court of Appeals affirmed the District Court in all aspects. (App. 1, 2, 5 X).

Relating to the alternative Count One Code #6 public concern disputed speech claim, the Hospital's motion argued, "Plaintiff's speech was a matter of personal opinion and benefit ... also failed to identify specific 'speech' she believed was protected ... any interest Plaintiff may have ... is far outweighed by the hospital's interest in protecting its patients from someone not authorized to make medical diagnoses", while at the same time alleged, despite warnings Petitioner continued with her speech (which was undisclosed) of what was "perceived" as demonstrative of violating the laws of Texas and practicing medicine without a license. (App. 5 E & G). Petitioner's affidavit denies such allegations with the claim she was wrongfully discharged (App. 5 H).

The issue before this Court concerns First Amendment claims governed by the framework of *Waters v. Churchill*, 511 U.S. 661 (1994) (when speech is in dispute) and the application of the Waters' "reasonableness test". Petitioner calls upon the Supreme Court to settle an important question of federal law that has not been, but should be, settled by the Supreme Court in the interest

of the jurisprudence of fundamental constitutional rights. Does the Hospital have the burden to allege specific facts in support of the Hospital's conclusion about what was said before they fired Petitioner Roberts, which are needed to effectuate the "reasonableness test" outlined in *Waters* and allow the proper application of the *Connick* test; and can the Hospital avoid liability when it refuses to come forth with such facts when challenged in court for its actions of terminating Petitioner for her speech with a letter of termination stated in general terms that is disputed? Accordingly, is justice served in a summary judgment proceeding to deny the truth of Petitioner's pleadings and apply the *Connick* test with ungoverned deference to the Hospital's generalized version of the reasons for termination and characterization of Petitioner's claims – standing alone – in a mock *Pickering* analysis purported to be a balance deserving of a constitutional right?

In the Count One pretext claim for prior whistleblower speech, the Hospital did not challenge with evidence or argue against on the grounds the specific whistleblower speech was not a matter of public concern, but the pretextual grounds were not of public concern, and asserted the affirmative defense Petitioner was fired for another totally different reason, insubordination, with continual violations as charged; allegations Petitioner denied (App. 5 E, H).

The issue in Petitioner's Count One pretext case concerns the application of the *Connick* test – to which speech is the court to apply the *Connick* test? Does the court apply the *Connick* test to prior undisputed speech or does the court apply the *Connick* test to the disputed pretextual reasons as in the case at bar and thus, foreclose a *Pickering* analysis on prior speech, the court had earlier determined was protected?

With reference to Count Two, the Hospital did not challenge with evidence or argue against Petitioner's claim the solicitation policy was dispensed with viewpoint discrimination, but only challenged the Count Two claim concerning statements made in pursuit of the Texas Whistleblower Act claim as being a matter of

personal benefit, the specific speech was not identified, and the Hospital's interest in efficiency outweighed Petitioner's interest. During oral argument, the Hospital did confirm, that summary judgment was sought on all causes of action. (App. 5 I).

In the Count Two claim the solicitation policy was applied against Petitioner with alleged viewpoint discrimination, Petitioner finds argument with the District Courts precedent, without supporting authority, the disputed non-speech element of her protected speech act needed to "rise to the level of a public concern" in the context of this case and the Court assumed the Hospital's state of mind behind its actions when there is arguably no evidence in the record to support the Hospital "acted to preserve the purpose of the Hospital's business ... ". (App. 2 at 17).

The issue in Petitioner's alternative Count Two public concern claim relating to the application of the solicitation policy to statements made pursuant to the Texas Whistleblower claim, the District Court found to be of a public concern, but her solicitation activities were not and were properly manner, time, and place regulated to the extent the activities disrupted the efficiency of the Hospital's goal of treating patients. (App. 2 at 15). The Hospital argued the solicitation was disruptive. (App. 2 at 14). The record is void of supporting testimony of how the verbal act interfered with the efficient function of the duties of any employee in the goal of treating patients, accordingly the issue before the Court, does a *Pickering* analysis of the *potential* for disruptiveness require admissible evidence to support a "clear potential" as in *Connick* and *Waters*? (App. 5 J & K).

Petitioner's Count Four claim is a Title VII hostile work environment claim of disparate treatment rooted in her Director's prejudice and sex based stereotyped set of beliefs and expectations (App. 2 at 26; App 5 X). The District Court tried the claim as a failure to promote claim and found Petitioner proffered no evidence of discriminatory motive as it related to the CAT scan "Lead Tech" designation of Petitioner's male co-worker (App. 2 at 29).

The Court of Appeals found, "Because Title VII addresses only "ultimate employment decisions," ... Roberts failed to state a prima facie case because the "lead tech" job did not constitute a new position .... the Hospital put forward valid, nondiscriminatory reasons ... that Roberts is unable to rebut" with competent evidence. (App. 1 at 9).

Petitioner filed a grievance dated 10-12-01, complaining of the denial of the equal opportunity to apply for the Lead Tech and her right as a citizen to speak on political issues related to purchasing a CT scanner. (App. 5 L). The Lead Tech was a designation based subjective criteria. (App. 5 M). The Lead Tech issued memorandum threatening disciplinary action and detailing job duties. (App. 5 N). Petitioner had previously filed a formal sex discrimination grievance dated 8-28-00. (App. 5 O) A grievance response dated 11-14-01 states "among the reason he was assigned these duties were your ... demonstrated lack of respect and of cooperation with management at any level". (App. 5 P).

The issue before the Court, can a hostile work environment claim be one based on disparate treatment spanning years to include evidence of subjective and discretionary promotion systems of statistical disparity that have the functional effect of denying women equal access to employment opportunities; and is the Petitioner entitled to have such a claim determined as such and not solely as a failure to promote claim; and is the Court in conflict with itself that Title VII only addresses ultimate actions.

The District Court found the Count Five Title VII retaliation claim failed because the temporal proximity was too long to create an inference of retaliation and Petitioner failed to show pretext. (App. 2 at 33-34). The Appeals court affirmed. (App. 1 at 10). The issue before the Court is what span of temporal proximity is sufficient at the summary judgment stage to be presumptive of causation, since the Courts are split on this issue and are not state of mind issues supported by circumstantial evidence on pretext for the jury?

ARGUMENT

1. The "By-laws" of a local governmental entity that state, the administrator "may dismiss any employee for good cause and thereafter make a report to the Board of the dismissal", create employment due process rights over the general presumption of an "at will" status?

In *Board of Regents v. Roth*, 408 U. S. 564, 577 (1972), the Court stated property interest are "created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law..." and accordingly Roberts cited as the independent source for her due process rights the hospital organizational By-laws promulgated by the governing Board of Managers. (App. 2 at 21).

A. Both Courts cited an abundance of case law not on point with the case at bar, since the By-laws are not an internal policy that can be equated with an employee manual and are not descriptive of an oral agreement; and the cited cases do not address such a requirement that "an independent source such as state law" must be referenced in an employment contract to alter the "at will" status of an employee; thus, the courts are also, in conflict with *Legal Services Corp. v. Velazquez, et. al.*, U. S. No. 99-603 (Feb. 2001) that "Judicial decisions do not stand as binding "precedent" for points that were not raised, not argued, and hence not analyzed."

B. The By-laws are more than a policy, they are secondary law. The District Court failed to recognize the distinction between a law and a policy. Law is defined as, "Something, such as an order or a dictum, having absolute or unquestioned authority." *The American Heritage College Dictionary*, Houghton Mifflin Co., pg. 785 (4th ed., © 2002). Whereas a policy is defined as "A course of action, guiding principle, or procedure considered expedient, prudent, or advantageous." *AHCD, Id*, pg. 1077.

As argued in Appellant's Motion for Rehearing, the By-laws of the hospital are secondary law, and prevail over a mere

presumption of a general provision (M. R. at 5-6). The Texas Code Construction Act supports such a contention stating, "if a general provision conflicts with a special or local provision..., the special or local provision prevails as an exception to the general provision, unless the general provision is the latter enactment...". Tex. Gov't. Code §311.026(a)(b).

C. The Board of Managers is the governing Board of the Hospital District under the Texas Constitution, Acts 1983, 58th Legislature Chapter 298 §1, (App. 5 B) and has the authority to promulgate rules and regulations for the operation of the hospital or hospital system. (By-laws Art. III Sec. 10 [App. 4 A]). The organizational By-laws of the Hospital, Article XI, states, "The Administrator shall perform all duties which may be required of him by the Board, and shall supervise all of the work and activities of the district and have general direction of the affairs of the district, within such limitations as may be prescribed by the Board. ... He shall supervise the work of all employees and shall assign to the employees their respective tasks and duties and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal." (App. 4 A)

While the By-laws grant to the administrator permission to terminate or not terminate an employee and apply to the administrator's individual seat of authority – as the Court of Appeals found – the By-laws clearly restrict the application and scope of that authority in a collective manner, equating as law the provision that employees can not be terminated except for "good cause". In Texas, it is presumed the intention of an enactment of law is to be effective with a just and reasonable result. Tex. Govn't Code §311.021 (1985). The Court of Appeals narrowly constricted the By-law without any rational basis for it's reasoning. (App. 1 at 4).

The By-law has a three-fold nature which encompasses more than the individual permission of authority to terminate or there would have been no need for a directive to afford protection against unjust termination and mandate accountability *after* the termination (App.

4A). In a rational basis of review it is only reasonable to conclude there would have been no need to restrict the dimensions of punishment *except* for the protection of the one being punished, and certainly such a restriction would have been of no benefit to the Administrator, contrary to what the Court of Appeals intimates. Furthermore, a job description pertains to a specific individuals qualifications and requirements to qualify for a position, therefore it is not rational to equate a by-law as such when a " bylaw" is defined as, "A law or rule governing the internal affairs of an organization; secondary law." *AHCD Id.* pg. 199. The By-law in question is the law governing termination through the conduit of the definitively defined standards contained in the employee handbook to accord due process (M.R. at 6).

While the "at will" status rest in the authority to be free to fire without restrictions, the "for cause" status rest in the dimensions of authority defined by the law to fire (*See Roth Id,*). By analogy, it would not be *reasonable* for a babysitter to presume they have permission to punish a child when the child has done no wrong, just because the parent gives permission to punish the child if they misbehave.

The Court cites the Texas case, *Sabine Pilot Service v. Hauck*, 687 S.W. 2d 733 (Tex. 1985) as authority governing policies that alter the at-will nature of the employment relationship and states "the policy must specifically and expressly limit the employer's ability to terminate the employee". (App. 2 at 21). The By-laws do just that with its restrictive clause, a dictum, having absolute or unquestioned authority, to terminate "for good cause". (App. 4 A).

2. Must a facial challenge to a local governmental policy in the employment context that is a prior restraint effectively condemning speech as a patient advocate and thereby associations with colleagues be judged upon its face, rather than the substantiality of the reasons advanced for the policy's purpose, in the absence of testimony of the specific speech supporting the charges against petitioner; accordingly, did the court properly apply the standard of review for a just determination?

"Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under, it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill v. State of Alabama*, 310 U. S. 88, 99 (1940); *Stromberg v. California*, 283 U. S. 359, 368 (1931); *Lanzetta v. State of New Jersey*, 306 U. S. 451, 454 (1939) "The section in question must be judged upon its face." *Thornhill v. State of Alabama*, 310 U. S. 88, 97 (1940). "What counts for purposes of vagueness analysis, however, is not what the Ordinance is 'designed to prohibit,' but what it acutually subjects to criminal penalty." *Morales, Id.*

A. Petitioner complains that Code #6 is unconstitutional in that it is a sweeping regulation that is sufficiently vague and standardless or subjective that it could be utilized to engage in viewpoint discrimination penalized by termination for those whose speech is perceived to be as making a diagnosis and practicing medicine without a license, and that she has standing to bring this challenge because the Code #6 policy was applied against her in such a manner by the Hospital. (3rd Am. Pet.). Petitioner argues the policy not only imposes a significant burden on the physician's right to hear what the technologist would otherwise have said, but effectively restricts association out of fear of what might be perceived as being said. (3rd Am. Pet.).

B. The Court of Appeals affirmed the judgment of the District Court as a matter of law and stated two independent reasons a policy may be found vague in that "[a] law is unconstitutionally vague if its lack of definitive standards either (1) fails to apprise persons of ordinary intelligence of the prohibited conduct, or (2) encourages arbitrary and discriminatory enforcement". *City of Chicago v. Morales*, 527 U. S. 41, 56-57 (1999). However, it only made reference applicable to the first reason. (App. 1 at 5). Even if an indulgent interpretation of the Appeals Court's opinion could be found to have addressed both of the above required reasons, which is arguable, the court failed to cite or apply the standard of review applicable to facial challenges set out by the Supreme Court that

confines the review to the *face of the statute* and not the substantiality of the reasons advanced behind the face. (App.1 at 6) (*Thornhill, Id.; Stromberg, Id.* and *Lanzetta, Id.*) .

The Courts below expressed no intention of narrowing the construction of the statute by prior State decisions. (App. 1 & 2). The Hospital disclosed no specific facts behind the face of the complaint that the court could analyze in conjunction with any associated permissible inferences that would occasion the court to expand the standard of review beyond the face of the policy, even though Petitioner challenges the policy as a sweeping regulation effectively condemning the freedom to speak as a patient advocate with further infringement on association with colleagues. *Thornhill, Id.* at 97. "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it". *Lazetta, Id.* at 454 quoting *United States v. Reese*, 92 U. S. 214, 221 (1875).

C. On appeal, the Hospital advanced the argument, the purpose of the policy was it "simply prohibits technicians from encroaching into the practice of medicine by giving medical diagnosis" and was "provided as a guide for the level of professionalism and conduct the Hospital would accept", along with the fact Petitioner was not a licensed physician. (App. 2 at 7). "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' ... It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.". *U. S. v. National Treasury Employees Union*, No. 93-1170 (1995). "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women ... To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.". *Whitney v. California*, 274 U. S. 357, 376 (1927) (concurring opinion) quoted in *U.S. v. National, Id.*.

D. As argued in Appellant's Brief, in a review limited to the face of the policy, one will find the Code's terms and phrases are nowhere definitively defined and are capable of ambiguous meanings depending on any given context. The policy is also, nonspecific as to an applicable mode of action for violations, to the exclusion of arbitrary interpretation and enforcement, and fails to identify the enforcement authority; therefore, it "fails to establish standards for `the enforcer' that are sufficient to guard against the arbitrary deprivation of liberty." *Morales, Id.*

Specifically, the relevant term diagnosis does not prescribe what shall be orthodox in matters of opinion or ideas expressed, or the context and form of such that would constitute any given speech as a diagnosis, leaving the terms construction to indefinite and discretionary interpretation (App. 4 B). The term cannot be rationally related to the context of the sentence in a definitive manner when it has more than one meaning which may refer to opinions that may not be "susceptible of objective measurement" depending on the context and form expressed. *Cramp v. Bd. of Public Instruction,* 368 U. S. 278, 287 (1961).

One definition of "diagnosis" is "[t]he act or process of determining the nature and cause of a disease or injury through examination of a patient" and another is "[t]he opinion derived from such an examination." *The American Heritage College Dictionary,* Houghton Mifflin Co., pg. 390 (4th ed. © 2002). According to another source it is "The determination of the nature of a case of disease". *Dorland's Illustrated Medical Dictionary,* by W. B. Saunders Company, pg. 461 (27th ed. © 1988). If one looks further at the meaning of "determination", which is defined as "[t]he settling of a question or case by an authoritative decision or pronouncement; the decision or pronouncement made" and to "determine" an issue is "[t]o decide or settle conclusively and authoritatively" or "[t]o limit in scope or extent", then it is reasonable to conclude a diagnosis is authoritatively distinctly separate from any of a number of individual perceptions or opinions communicated as pertinent

information in the best interest of the patient or intended as a critique for the advancement of learning or as a critique of an authoritative judgment for purposes of reporting negligence. *A.H.C.D., Id.* pg. 386. "Words which are vague and fluid ... may be as much a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff*, 344 U. S. 174, 176 (1952).

Neither can it be rationally determined that Code #6 includes CAT scan medical technology in the phrase "the scope of practice" when the scope is not defined and the specific field of CAT scan, a relatively new and rapidly advancing technical field with ever changing job demands and expectations, is not comparable to diagnostic x-ray in the health care setting. If one construes the context of the scope to relate back to the agency relationship as being exclusive of that relationship, then the policy does not sufficiently detail the dimensions and design of the scope of the agency relationship with the permissible limits of outreach in the chain of communication; for example, the agency relationship may include giving informed consent or post examination instructions to patients, or notification to appropriate health providers the need for immediate clinical response based on procedural findings and the patients condition. It is not reasonable to judge communications outside the agency relationship the same as those inside the agency relationship as the Court purports. Code #6 gives no clue as to who qualifies as an enforcement authority or by what standard the policy's fundamental ingredients are determined to be a violation. (App. 4 B).

E. The Court did not judge the policy upon its face, but proceeded to base its judgment on the reasons advanced by the Hospital outside the policy's stated purpose and the vague accusations under it of the Hospital's purported concerns advanced by those who desired to protect a code of silence as evidenced by the Court's reference to the physician's realm, a subject matter the Code does not even address and is irrelevant in the facial challenge (App. 1 at 5). "A 'reasonable' burden on expression requires a justification far

stronger than mere speculation about serious harm." *U. S. v. National Treasury Employees Union*, No. 93-1170 (1995).

A rational basis of review would include harmonization of Code #6 with the entire policy (Code's 1 & 5 specifically), so effect could be given to the stated purpose of the entire Code without contradiction, yet there is no evidence the Court did so analyze; therefore, the Court could not have rationally determined the validity of non-specific statements in relation to Code #6. (App. 1 at 5). As the Court rationalized and Petitioner agrees, a person of ordinary intelligence would understand that the policy prohibits diagnosis – whatever that means exactly – and yet the Court failed to rationalize a person of ordinary intelligence would also, recognize and understand that technologist are not physicians. (App. 1 at 5). The policy does not give sufficient notice when "it permits punishment" of a technician while engaging in a wide array of innocent conduct in the role of agent or as a patient advocate. *Stromberg v. People of State of California*, 283 U. S. 359, 370 (1931).

3. With regard to First Amendment claims governed by *Waters v. Churchill*, 511 U.S. 661 (1994), the Hospital refused to come forth with specific, non-conclusory, information of the alleged speech as the employer thought it to be and facts of a reasonable investigation predating Petitioners firing, stating it would be asking them "to prove [plaintiff's] case"; accordingly, is justice served in a summary judgment proceeding to deny the truth of Petitioner's pleadings and apply the *Connick* test with ungoverned deference to the Hospital's generalized version and characterization of Petitioner's claims – standing alone – in a mock *Pickering* analysis purported to be a balance deserving of a constitutional right, or does the Hospital have the burden to come forth with facts to effectuate the *Waters* and *Connick* test to negate liability, or some other undefined procedure?

Waters v. Churchill, 511 U.S. 661 (1994), provides the governing framework for procedures which courts must follow in deciding

First Amendment claims where the government is the employer and the speech is in dispute for which Petitioner was fired. *Waters, Id.* In *Waters*, the court determined "[t]he Connick test should be applied to what the government employer reasonably thought was said ... [o]n the other hand, courts must not apply the Connick test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusion." In reference to the courts opinion, Justice Souter pointed out, "[t]he reasonableness test it sets out is clearly the one that lower courts should apply." *Waters, Id.*

A. In *Foley v. University of Houston System, et al*, 324 F. 3d. 310 (5th Cir. 2003) the Court determined and the Hospital argued, the specific speech must be alleged before the court can apply the *Connick* test. (App. 5 Q). Petitioner's affidavit and 3rd. Am. Pet. did allege her version of facts of the specific speech, even though the Hospital contended otherwise. (App. 5 R & X). However, the Hospital did not allege their version of specific speech facts underlying the charges against Petitioner and clearly stated in response to Discovery that to do so was "asking them to prove [Petitioner's] case". (App. 5 A & F). Petitioner denied the general allegations and in the absence of specific underlying testimony supporting the Hospital's charges, the Court never knew the required factual information to which it must apply the *Connick* test mandated in a *Waters* analysis. (App. 5 H & A). Therefore, according to *Waters* and *Foley* the Court's task was insurmountable; even though Petitioner's version of specific facts was clearly not of a personal nature, as the District Court found when it stated in it's conclusion to the opinion, "[t]he Court recognizes that Plaintiff had in mind the best interest of her patients and the Hospital when she attempted to assist patients and doctors", a fact that is irrelevant in a *Waters'* analysis. (App. 2 at 34).

B. In the second part of a *Waters'* analysis, facts of what the Hospital reasonably thought was said before Petitioner's firing are a necessary ingredient in considering the reasonableness of the

Hospital's investigation and conclusion to terminate. *Waters, Id.* Petitioner could not allege facts of any underlying investigation, since such facts were not in the purview of Petitioner's knowledge as she testified she was never asked anything about the charges and was denied any information when she asked. (App. 5 H). Therefore, it is only reasonable to conclude the Hospital should have the burden to come forth with the specific facts of such information and they did not as the record clearly shows. (App. 1, 2, 5 A & E). "A majority (though a different one) is of the view that employers whose conduct fails the plurality's reasonableness test have violated the Free Speech clause.". *Waters, Id.*

C. Even if the Court were to analyze the general subject matter of the Hospital's allegations as argued during oral argument, which stated it was the Hospital's perception Petitioner Roberts' undisclosed speech was an alleged violation of the Code #6 policy equated with violating the laws of Texas and practicing medicine without a license, a person of ordinary intelligence would not surmise such a conclusion to be reasonable in light of the law and Petitioner's well known level of education and authority as a CAT scan technologist. (App. 2 at 34; App. 5 G). Tex. Occ. Code Ann. §151.002 (13) defines Practicing medicine as the following:

(13) "Practicing medicine" means the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who:

(A) publicly professes to be a physician or surgeon; or

(B) directly or indirectly charges money or other compensation for those services.

With the Hospital's avoidance in disclosing the specific speech for which Petitioner was fired and their avoidance in challenging the facial challenge to the Code #6 policy with any meaningful resolve to understand how or by what standard Petitioner's speech convicted her of the charges equated as practicing medicine without a license, the Hospital argued the policy did not

regulate her speech, but her right to [speak]. (App. 5 E). It is also, significant the Hospital's summary judgment motion argued with uncertainty, "any interest Plaintiff *may* have had in diagnosing patients". (emphasis added) (App. 5 E).

The Hospital cited as authority and the Courts based its ruling on *Southern Christian Leadership Conference v. Supreme Court of State of La.*, 252 F 3d 781, (5th Cir. 2001). (App. 1 & 2). *Southern Christian* is not controlling in the present context, it is not on point since the law in question limited the right of representation to certain clients and did not prohibit or punish speech based on its content or point of view, and was content neutral. *Southern, Id.* See *Clark. v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984) stating that time, place, and manner test is only applicable to speech regulations that are content neutral and restrictions on expression are content neutral if they are "justified without reference to the content of the regulated spech". "[T]he neutrality inquiry does not focus on the motive of the violator". *United States v. Weslin*, 964 F. Supp. 83 (W.D. N.Y. 1997). Code #6 restricts speech based on the content and viewpoint expressed. (App. 4 B). The District Court ruled, "Plaintiff, who is not a licensed physician, had no right to practice medicine by diagnosing patients and provide unsolicited diagnosis to doctors or patients." (App. 2 at 11). Petitioner never claimed a right to do any of those things, nor did those things, much less argue such things. (App. 5 H). Based on Code #5 and common law, she claims a right to speak in the best interest of the patient. (App. 4 B).

"It is, ... the governmental interest at stake, that helps determine whether a restriction on the expression is valid." *Texas v. Johnson*, 491 U. S. 397, 407 (1989). The Hospital's asserted interest being, "protecting its patients from someone not authorized to make medical diagnoses", is simply not implicated on the facts in the record. (App. 5 E). The District Court drew an incorrect conclusion when it stated, "For example, Plaintiff alleges she correctly diagnosed a patient as having a brain tumor when the radiologist missed the diagnosis after examining the patient's CAT scan

results." (App. 3 at 10-11).

The record clearly shows the correct diagnosis was made the following day from an MRI, not from Roberts, and the fact Roberts expressed her concerns the scan was not normal to the attending physician after he told her he received a normal report does not fit the definition of the term "diagnosis", even if taken out of the context of the Code #6 policy (see facial argument above). (App. 5 S at 27-28). Roberts was in a conundrum, if she had kept her mouth shut, as the Court condemned her for not doing, then Roberts would have been in violation of Codes #1 & 5, the patient could have possibly died, all in the Hospital's asserted interest of protecting the patient – or protecting themselves? (App. 4 B). "[T]he purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers." *Cornelius v. NAACP Legal Defense, Id.* at 813.

The Hospital cited no supporting authority it's not a matter of pubic concern for a healthcare worker to report negligence or a foreseeable risk of harm based on knowledge learned through training and experience because the particular language used encroaches on the realm of the physician and may be perceived as practicing medicine without a license. The words of Samuel Johnson, English author, critic & lexicographer (1709 - 1784) says it best, "Language is the dress of thought". *AHCD, Id.* at 687. The Hospital has only "posited the existence of the disease sought to be cured" that lies somewhere in someone's undefined thought. *U. S. v. National Treasury Employees Union, Id.*. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U. S. 357, 377 (1927).

D. Accordingly, in a summary judgment proceeding when it is mandated to deny the truth of Petitioner's pleadings to protect the Hospital and the "[t]he Court recognizes that Plaintiff had in mind the best interest of her patients and the Hospital", is the

Court to proceed to the *Pickering* analysis on the Hospital's generalized version and characterization of Petitioner's claims still denying the truth of Petitioner's pleadings - standing alone – in a mock *Pickering* analysis purported to be a balance deserving of a constitutional right or does Petitioner's version of specific speech earn a place in the balance? (App. 2 at 34)

4. In a freedom of speech pretext claim alleging retaliation for previous undisputed speech, what is the proper application of the *Connick v. Myers*, 461 U.S. 138 (1983) test – to which speech is the court to apply the *Connick* test? Does the court apply the *Connick* test to the prior speech for which Petitioner claims she was fired under the guise of the Code #6 & solicitation policies or is the *Connick* test applied to the disputed pretextual reasons, taken as true, as in the case at bar and thus, foreclose a *Pickering* analysis on the prior speech?

"The Connick test is to be applied to the speech for which [Petitioner] was fired." *Waters v. Churchill*, 511 U.S. 661, 681 (1994). "A public employer violates the Free Speech Clause, that is, ... if the employer invokes the third-party report merely as a pretext to shield disciplinary action taken because of protected speech the employer believed or genuinely suspects that the employee uttered at another time." Justice Souter concurring, *Waters, Id.*

A. Petitioner was a known whistlblower and had filed such a suit in February prior to her firing the following June. (App. 5 H). The District Court found "the content, form and context of statements provided by plaintiff in pursuit of a Texas Whistleblower Act claim can be fairly considered as relating to matters of political, social, or other concern to the community." (App. 2 at 13).

Petitioner's 3rd Amended Petition's pled an alternative Count One claim, claiming termination under the pretext of the Code #6 and solicitation policies "for speaking out on issues of public concern as a private citizen exposing inefficient and ineffective management relating to alleged violations of the competitive bidding

laws in the the purchase of a CAT scan machine when plaintiff called two Titus County Memorial Hospital Board members from her home phone." The District Court determined the whistle-blower speech was a matter of public concern. (App. 2 at 13).

B. The District Court determined Petitioner's retaliation claim "failed to prove the first prong of the Denton analysis", being that "[t]he employee must establish: (1) the speech involves a matter of public concern;"[1] and thus, "[a]ccordingly, the Court need not determine the final two prongs of the analysis ...". (App. 2 at 30-31).

Even though the District Court had already determined the whistleblower speech was a matter of public concern, it also determined Petitioner had not met her burden of establishing her speech was a matter of public concern because the pretextual reasons, taken as true with ungoverned deference toward the Hospital, were not a matter of public concern. (App. 2 at 31). The Court cited no authority that in a pretext case the plaintiff has to prove the pretextual reasons advanced in the letter of firing were a matter of public concern. (App. 1 & 2). Since the Court stopped the analysis after the first step of Roberts' burden, the Hospital's affirmative defense of insubordination was never reached for a determination of the truth of the matter on the facts.

C. The Waters Court considered a reasonable factfinder might conclude prior speech to be the true motivation behind the decision to fire and "then the court will have to determine whether those statements were protected speech, a different matter than the one before us now". *Waters, Id.* Therefore, the Waters Court never mandated the *Connick* test be applied to the employers version of speech in a pretext case for prior speech just because the speech for which Petitioner was fired is in dispute. *Waters, Id.*

Accordingly, when the Courts applied the *Connick* test to the pretext speech, the Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court in *Waters v. Churchill*, 511 U.S. 661 (1994).

[1] Denton v. Morgan, 136 F. 3d 1038, 1042 n.2 (5th Cir. 1998) (App. 2 at 30)

5. In a challenge to a solicitation policy applied to Petitioner with alleged viewpoint discrimination in a non-public forum, where it is undisputed the policy was not uniformly enforced, the policy's purpose was not argued or implicated, the incidental restriction was greater than what was essential, and the restriction had the effect of silencing political speech in general; does the Petitioner need to prove the disputed non-speech element of the same speech act is a matter of public concern etcetera, when the Court found the speech element was a matter of public concern, yet cited no authority to support this precedent?

"The existence of reasonable ground for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination. *Cornelius v. NAACP Legal Defense & Ed. Fund,* 473 U. S. 788, 812 (1985).

A. The Hospital did not challenge or argue against Petitioner's claim the solicitation policy was applied to her with viewpoint discrimination, accordingly the policy's purpose was not asserted. (App. 5 E). The Court made an improper assumption on the Hospital's state of mind behind its actions when there is arguably no evidence in the record to implicate the Hospital "acted to preserve the purpose of the Hospital's business of treating patients". During oral argument, the Hospital did confirm, that summary judgment was sought on all causes of action. (App. 5 I).

B. The District Court determined, "Plaintiff statements in pursuit of her Texas Whistlblower Act claims" were of public concern. (App. 2 at 14). However, the District Court ruled Petitioner's claim failed because the disputed non-speech element of her activities did "not rise to the level of a public concern"; the Hospital "acted to preserve the purpose of the Hospital's business in treating patients"; and "Plaintiff was free to contact employees" after employment hours. (App. 2 at 17).

C. The Courts failed to recognize the 4-9-02 solicitation counsel did not state the activity was disruptive to the "business of treat-

ing patients", but it did restrict Petitioner's freedoms greater than what was essential to the business of treating patients when it restricted her personal freedom beyond other employees. (App. 5 T). The solicitation policy did not prohibit solicitation at the Hospital and it was allowed during "break periods, meal times, or other specified periods during the work day when employees are properly not engaged in performing their work tasks." (App. 2 at 16). Any alleged employee complaints, were from undisclosed witnesses, even upon request. (App. 2 at 17). Roberts denied her speech continued. (App. 5 H). In *United States v. O'brien*, 391 U. S. 367, 368-69 (1968) the Court stated the governmental interest of the regulation is sufficiently justified "if the incidental restriction on alleged First Amendment freedom is no greater than is essential to that interest." However, *Thornhill v. State of Alabama*, 310 U. S. 88, 107 (1940) stands for the principle that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." These circumstances were appropriate. (App. 5 U; App. 2 at 16).

D. Can the very "act" of speaking, alleged to be a violation of the solicitation policy, overcome the speech the Court determined to be a matter of public concern on the argument the disputed action was not a matter of public concern etcetera, in the context of this case and the following: 1) a request for full names, addresses and phone numbers from all possible witnesses is arguably "solicitation" since it does not seek information through influence or persuasion to embrace or support a point of view, when with the intended purpose to fulfill a legal requirement; 2) the solicitation policy was not uniformly enforced, and the Texas Supreme Court[1] has ruled an employer cannot be held liable for the violation of a reasonable policy, "as long as the rule is uniformly enforced"; and 3) the Court cites no authority to support this precedent the speech and disputed non-speech element of the same speech act both need to "rise to the level of a public concern."

[1] *Continental Coffee Products v. Cazarez*, 937 S.W. 2d 444, 451 (Tex. 1996) (App. 5 V)

(App. 2 & 5 U). Also, Petitioner's testimony was not disputed, solicitation was a common practice not enforced, therefore solicitation became a benefit by custom or practice as the Court stated in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384, (1993), "[a] public university is under no obligation to provide benefits or facilities to student groups. Once it chooses to do so, however, it may not discriminate among the recipients of those benefits based upon the viewpoint of their speech." (App. 5 E).

E. Petitioner testified the action against her had the effect of silencing political speech in general among employees who did not know what the Whistleblower Act was, since the Act was not posted as required by law. (App. 5 U). It is not reasonable to restrict speech relating to the legal right of an employee who seeks protection from discrimination and the accountability of public officials for the abuse of public trust under the guise of a policy, but not restrict speech relating to paintball fund drives, which is clearly solicitation, under the same policy; nor is it reasonable to conclude one is more disruptive than the other, when in light of the record taken most favorably to Roberts, it was not disruptive. (App. 5 U & T). To do so, silences speech the Court found was a matter of public concern, which goes against the bedrock principle, speech may not be prohibited because "society finds the idea itself offen-sive or disagreeable" and "[w]henever the government suppresses speech in order to avoid endorsing it, the government has suppressed the speech based on its viewpoint." *The Good News Club. v. Milford Central School*, No. 99-2036 (2000).

6. In the *Pickering v. Board of Ed.*, 391 U. S. 563 (1968) analysis is the potential for disruptiveness to the Hospital's efficiency of treating patients to be met by admissible evidence carrying a "clear potential" as in *Connick v. Myers* and *Waters v. Churchill*?

"A 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harm". *United States v. National Treasury Employees Union*, No. 93-1170 (1995).

A. The Court determined Petitioner's statements made in pursuit of her Texas Whistleblower Act Claims (Count Two) were a matter of public concern, but her solicitation activities were not and were properly manner, time, and place regulated to the extent Plaintiff's activities disrupted the efficiency of the Hospital's goal of treating patients. (App. 2). The Hospital's motion in relevant part claimed, Petitioner's interest in soliciting was far outweighed by their interest in promoting hospital efficiency. (App. 5 E). The Hospital argued the solicitation was disruptive, but the record shows a total absence of testimony stating it was disruptive and no supporting testimony of how the speech interfered with the efficient function of the duties of any employee in the treatment of patients, a fact Petitioner denied, which was never controverted. (App. 5 U). For all the reasons argued above in No. 5, the Hospital did not reasonably and legitimately restrict Petitioner's speech.

B. Since the Court relied on *Connick, Id.* and implied the time, manner, and place of the protected speech was disruptive to the efficiency of treating patients an analysis of those factors falls far short of *Connick* or *Waters*. (App. 2) The speech did occur at the Hospital, but so did the paintball solicitation, the Hospital did not prohibit solicitation at the Hospital (App. 2 at 16), Roberts testified to her acts as verbal on an individual basis, the various times she spoke (when she & the other employees were not engaged in work related activities), the various places (out of the way places), this testimony was not disputed (App. 2 & 5 U, W). The Court cited to D. Mot, Ex. 7, at 12 (App. 5 J) and the letter of counsel (App. 5 T) as the only evidence to support the finding, however Petitioner objected (App. R) to this evidence as not probative of any disruption to the goal of treating patients. See *Rankin v. Mcpherson*, 483 U. S. 378, 389-393 (1987) of how this record does not support such a conclusion by the Court. *Connick* and *Waters* both turned on a "clear potential", there is no potential here, to be fully argued in the Brief on the Merits with the Courts permission.

7. In a Title VII claim, is the Petitioner entitled to have the Court determine her prima facie case on the type claim pled, or as in the case at bar, does the Court rule on the type claim as the Hospital characterizes it; and accordingly, can Petitioner's hostile work environment claim be based on disparate treatment rooted in her Director's prejudice and sex based stereotyped set of beliefs and expectations and use supporting evidence of subjective and discretionary promotion systems of statistical disparity; and is the Court in conflict with itself that Title VII only addresses ultimate employment actions.

"[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their ... gender ... offends Title VII's broad rule of workplace equality." *Pennsylvania State Police v. Suders*, No. 03-95 (2004); *Harris v. Forkliff Systems Inc.*, 510 U.S. 17, 22 (1993).

A. Petitioner pled a hostile work environment disparate treatment claim, not a failure to promote claim and the Courts ruled on the claim as a failure to promote claim. (App. 2 at 26-27). When the District Court found, "plaintiff proffered no evidence of discriminatory motive", it discounted Roberts identified a specific employment practice that had the effect of denying women equal access to employment opportunities with a statistical disparity that raised an inference of discriminatory intent. (App. 5 X). In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 97 (1988), the Court concluded "that disparate impact analysis may be applied to a subjective or discretionary promotion system". Also, sex discrimination grievances that went without investigation are probative of motive or the Courts would not allow such as an affirmative defense. The Court of Appeals is incorrect that this case fails because "Title VII" addresses only ultimate employment actions (App. 1 at 9). *Green v.. Administrators of the Tulane Educational Fund*, 284 F. 3d 642 (5h Cir. 2002).

With the Courts permission, detailed argument is reserved till the Brief on the Merits.

8. What span of temporal proximity is sufficient to be presumptive of causation in a Title VII retaliation claim, since the Courts are in great conflict on this issue and are not state of mind issues supported by circumstantial evidence on pretext for the jury?

A. Temporal proximity supports a causal connection for an inference of retaliation. *Walsdorf v. Board of Commissioners of East Jefferson Levee Dist.*, 857 F. 2d 1047 (5th Cir. 1988) (stating adverse action within seven months of filing complaint shows inference of retaliation).

B. "Certain scenarios may arise when a material fact cannot be resolved without weighing the credibility of a particular witnessor individual – such as when the defendant's liability turns on an individual's state of mind and the plaintiff has presented circumstantial evidence probative of intent." *Schoonejongen v. Curtis-Wright Corp.*, 143 F. 3d 120 (3rd Cir.1998).

These will be fully argued in the Brief on the Merits with the Courts permission.

CONCLUSION & PRAYER

For the foregoing reasons, Petitioner prays the Court will grant this Petition for Writ of Certiorari request briefs from the parties, set this case for oral argument, and after oral argument, sustain Petitioner's issues presented for review, reverse the judgment of the District Court and remand this case for a trial on the merits pending, a determination that Petitioner's claim is meritorious.

Thank you for you time and attention in this matter.

Respectfully submitted,

Joan Carol Ellis Roberts

Joan Carol Ellis Roberts, Pro se
65 C.R. 1044
Mt. Pleasant, Texas 75455
(903)572-9667

30.

Case No. _____

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOAN ROBERTS

Plaintiff - Appellant - Petitioner

v.

TITUS COUNTY MEMORIAL HOSPITAL; GEORGE BURNS, Director of Radiology Titus County Memorial Hospital; GENE LOTT, Director of Human Resources Titus County Memorial Hospital

Defendants- Appellees - Respondent

PROOF OF SERVICE

I, JOAN ROBERTS, do swear or declare that on this date, August 26, 2005, I have served Petitioner's PETITION FOR WRIT OF CERTIORARI, from the United Stated Court of Appeals for the Fifth Circuit, Cause No-04-41101 by certified U. S. Mail, return receipt requested, to Jeffery C. Lewis, attorney in charge for Titus County Memorial Hospital; George Burns, Director of Radiology Titus County Memorial Hospital; Gene Lott, Director of Human Resources, Titus County Memorial Hospital and whose address is 1710 Moores Lane, P. O. Box 5517, Texarkana, Texas, 75505-5517, telephone (903)792-8246.

Joan Carol Ellis Roberts, Pro Se

Joan Carol Ellis Roberts

65 C.R. 1044

Mt. Pleasant, Texas, 75455

(903)572-9667

STATE OF TEXAS §
TITUS COUNTY §

BEFORE ME, THE UNDERSIGNED NOTARY, ON THIS DAY PERSONALLY APPEARED, JOAN CAROL ELLIS ROBERTS, A PERSON WHOSE IDENTITY IS KNOWN TO ME. AFTER I ADMINISTERED AN OATH TO HER, UPON HER OATH, SHE SAID THE ABOVE STATEMENT CONTAINED IN THE PROOF OF SERVICE IS TRUE AND CORRECT AND THE FACTS CONTAINED WITHIN ARE WITHIN HER PERSONAL KNOWLEDGE.

THE UNDERSIGNED NOTARY, ON AUGUST 26, 2005.

Lycledia D Hall

NOTARY PUBLIC, STATE OF TEXAS

LYCLEDIA D. HALL
Notary Public, State of Texas
Commission Expires 8-30-08

(2)

IN THE

SUPREME COURT OF THE UNITED STATES

JOAN ROBERTS,
Petitioner

v.

TITUS COUNTY MEMORIAL HOSPITAL;
GEORGE BURNS, Director of Radiology,
Titus County Memorial Hospital;
GENE LOTT, Director of Human Resources,
Titus County Memorial Hospital

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

Summary Calendar
No. 04-41101

FILED
April 14, 2005
Charles R. Fulbruge III
Clerk

JOAN CAROL ELLIS ROBERTS,
Plaintiff-Appellant,

versus

TITUS COUNTY MEMORIAL HOSPITAL; GEORGE BURNS, Director of Radiology Titus County Memorial Hospital; GENE LOTT, Director of Human Resources Titus County Memorial Hospital,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas,
Texarkana Division
No. 5:03-CV-00021-DF

Before JONES, BARKSDALE, and PRADO, Circuit Judges.
PER CURIAM: *

Appellant Joan Roberts ("Roberts") appeals pro se the district court's award of summary judgment to Appellees Titus County Memorial Hospital ("Hospital") and employees of the Hospital, Director of Radiology George Burns, and Director of Human

Resources Gene Lott. The district court wrote a thorough, carefully reasoned opinion and held, inter alia, that Roberts

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

failed to raise a material issue of triable fact on her claims of invasion of her First Amendment and Due Process rights, as well as Roberts's allegations of Title VII violations. We AFFIRM the district court in all respects.

BACKGROUND

The Hospital employed Roberts as a CAT scan technologist in the radiology department from 1986 to 2002. Roberts routinely received high marks for her technological capabilities, but she had a mixed record for interpersonal relationships. Specifically, Roberts had a documented history of undermining doctors' orders and diagnoses of patients, as well as difficulty in arriving to work on time and in getting along with coworkers. In light of her inter personal problems, and the qualifications of another technologist, when the Hospital opened a "lead tech" position, which required the same amount of work and paid the same salary, Roberts did not receive the position.

Roberts's First Amendment claim arises in part out of her disagreement with the Hospital's method for purchasing equipment, and her verbal complaints to two Hospital board members asserting the Hospital's violation of unspecified "competitive bidding" laws. Although the Hospital ultimately purchased the equipment favored by Roberts (who claims no entitlement to participate in this decision making process), Roberts notified Hospital employees she intended to pursue a whistleblower action against the Hospital. After

filing suit, Roberts began soliciting Hospital employees for information concerning this action during working hours in violation of Hospital policy. Roberts received written warnings for soliciting during working hours and for improperly offering medical advice to patients. Failing to heed these warnings, Roberts was terminated. Roberts pursued administrative action with the Equal Employment Opportunity Commission (EEOC) and ultimately filed the instant suit, claiming, inter alia, a violation of her First Amendment rights, her Due Process rights under the Fourteenth Amendment, as well as violations of Title VII.

DISCUSSION

This court reviews the grant of summary judgment de novo, using the same standard as the district court. Urbano v. Continental Airlines, Inc., 138 F. 3d 204, 205 (5th Cir. 1998).

A property right in maintaining employment may not be deprived without due process. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 105 S. Ct. 1487, 1491 (1985). However, no process is due where no protected property interest exists. Bd. of Regents v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705 (1976). As the constitution does not itself create property interests, a plaintiff claiming deprivation of a property right must clearly establish existence of such a right. Bishop v. Wood, 426 U.S. 341, 344-47, 96 S. Ct. 2074, 2076-79 (1972). In

ascertaining the existence of a property interest, we look to state law. Id. at 344, 96 S. Ct. at 2077. Texas courts strongly adhere to the employment at-will doctrine. See, e.g., Sabine Pilot Serv. v. Hauck, 687 S. W. 2d 733, 734 (Tex. 1985). Texas law imposes a strong presumption in favor of at-will employment. Zenor v. El Paso Healthcare Sys., Ltd., 176 F. 3d 847, 862 (5th Cir. 1999); Montgomery County Hosp. Dist. v. Brown, 965 S. W. 2d 501 (Tex. 1998). Where a plaintiff relies on an employment policy, as

opposed to an employment contract, to rebut the presumption of at-will employment, the proffered employment policy must contain explicit contractual terms altering the at-will relationship in a meaningful way (e.g., through an employment contract). Id. Texas courts are reluctant to imply deviation from at-will employment from ambiguous employment policies. Id.

Based on Texas law and the employment policy at issue, the district court rejected Roberts's Due Process claims. Roberts claims no employment contract. Instead, Roberts cites the following provision from the Hospital's bylaws as evidence of a constitutional property interest in her continued employment:

> The Board of Managers shall appoint, under terms prescribed by the Board, a general manager to be known as the Administrator of the hospital district. . . . He shall supervise the work of all employees. . . and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal.

This provision, however, has nothing to do with Roberts's employment. Instead, it discusses the responsibilities of an

entirely different employee at the Hospital, the Hospital Administrator. Roberts was not terminated by the Hospital Administrator, but instead by the Director of Human Resources. The district court correctly found that Roberts lacked a property interest in her continued employment because she failed to demonstrate that she was not an employee at-will, and therefore was not entitled to any process prior to her termination.

Roberts's First Amendment claims are similarly unavailing. She raises two specific claims in this vein: (1) that the Hospital's policy prohibiting her from acting as a "patient advocate"[1] was impermissibly vague and impeded her First Amendment rights; and (2) that the Hospital's anti-solicitation policy violated her First Amendment rights.

A statute, rule, or policy may be deemed impermissibly vague for either of two discrete reasons: It fails to provide people of ordinary intelligence a reasonable opportunity or fair notice to understand what conduct it prohibits; or, it authorizes or encourages arbitrary and discriminatory enforcement. See Chicago v. Morales, 527 U.S. 41, 56-57, 119 S. Ct. 1849, 1859 (1999). Roberts contends that Hospital policy preventing her from interpreting x-rays or CAT scan results – i.e., diagnosing patients – constituted an impermissibly vague policy. As a matter of law,

---

1 This title is an invention of Roberts. No term or condition of employment vests her with such a title.

as the district court held, this claim is without merit. The Hospital's policy provides an individual of ordinary intelligence fair notice that diagnosing patients is the realm of physicians, and that staff are not to do so. Roberts, a non-physician, radiologic technologist, had sufficient notice to conform her conduct to clear Hospital policy.

Roberts's second First Amendment claim rests on an individual's ability to speak on matters of public concern. Speech addresses a matter of public concern when it is made primarily in the speaker's role as a citizen rather than as an employee addressing solely matters of personal interest. Connick v. Myers, 461 U.S. 138, 148, 103 S. Ct. 1684, 1690-91 (1983). This court has addressed First Amendment implications of policies similar to the instant policy. In Southern Christian Leadership Conference v. Supreme Court of the State of Louisiana, we held that a state supreme court rule prohibiting non-lawyer students from representing certain solicited indigent parties did not prevent speech of any kind. 252 F. 3d 781, 789-90 (5th Cir. 2001). If a court finds that the speech touches upon a matter of public

concern, it must balance the plaintiff's interest in making those statements against "the interest of the State, as an employer, in promoting efficiency of public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35 (1968).

Roberts's practice of providing diagnoses to patients receiving x-rays and CAT scans, as well as giving unsolicited diagnoses to doctors, did not touch on a matter of public concern. The policy existed to protect patients from the unauthorized practice of medicine; to term this a free speech limitation would be a dangerous intrusion by the judiciary on the Hospital's prerogative to render medical services. See Connick, 461 U.S. at 146, 103 S. Ct. at 1690 ("[W]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."). Moreover, we agree with the district court that even if Roberts could demonstrate her speech touched on a matter of public concern, the Pickering balancing test requires ruling in the Hospital's favor. The Hospital was constitutionally justified in regulating the time, place, and manner of Roberts's speech where Roberts was in no way qualified to provide diagnoses.

As to Roberts's First Amendment claim concerning the Hospital's anti-solicitation policy, we agree with the district court that her speech in this area was arguably a matter of public concern. The goal of the Texas Whistleblower Act is to enhance openness and protect those informing officials of government wrongdoing. See TEX. GOV'T CODE ANN. § 554.002 (a) (VERNON SUPP. 2004).

Nevertheless, under the Pickering balancing test, Roberts cannot prevail on these claims. Although Roberts had a right to make inquiries and statements about possible violations of state law and policy, the Hospital had a concomitant right to prevent such solicitations during working hours in the workplace. Roberts could have done her fact finding outside the Hospital on her own time; the anti-solicitation policy represents a valid time, place, and manner restriction. Cf. Connick, 461 U.S. at 148-53, 103 S. Ct. at 1691-93 (holding that termination of a public employee who distributed questionnaire did not violate the First Amendment, as most of the questions related to inter-office policies and the conduct threatened the agency's institutional efficiency). For these reasons, the district court properly awarded Appellees summary judgment on all of Roberts's First Amendment claims.

In considering a Title VII claim, unless direct evidence of discrimination exists, a court must utilize the three-step analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-25 (1973). Under this formula, a plaintiff must first establish a prima facie case of discrimination. If the plaintiff makes a prima facie case, the employer can rebut the claim by offering a legitimate, non-discriminatory reason for the employment decision. Bodenheimer v. PPG Industries, Inc., 5 F. 3d 955, 957 (5th Cir. 1993). If the defendant succeeds, the court moves to the third step of the

analysis, where the plaintiff bears the burden to prove that the reasons offered by the defendant are pretextual. Id.

Additionally, a plaintiff may establish a Title VII violation by demonstrating a hostile work environment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23, 114 S. Ct. 367, 371 (1993). A prima facie case of a hostile work environment is achieved by producing evidence that (1) she belongs to a protected group; (2) she experienced unwelcome sexual harassment; (3) the harassment

was based on sex; (4) the harassment affected a "term, condition or privilege" of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. See Shepherd v. Comptroller of Public Accounts for the State of Texas, 168 F. 3d 871, 873 (5th Cir. 1999).

Because Title VII addresses only "ultimate employment decisions," Dollis v. Rubin, 77 F. 3d 777, 781-82 (5th Cir. 1995), Roberts failed to state a prima facie case because the "lead tech" job did not constitute a new position – it required identical hours and received identical pay. Additionally, even assuming the "lead tech" job was considered a new position, the Hospital put forward valid, non-discriminatory reasons (namely, that Roberts was not suited for the job as she did not get along with others well, and that the person hired had superior credentials) that Roberts is unable to rebut with competent summary judgment evidence.

Similarly, Roberts failed to adduce any material issue of triable fact connecting her EEOC complaint with her valid termination, so her Title VII retaliation claim also fails under McDonnell-Douglas. Based on the numerous valid reasons for her termination, and the dearth of evidence demonstrating any sort of pretext for that termination decision, Roberts fails on this claim as well. Cf. Chaney v. New Orleans Public Facility Management, Inc., 179 F. 3d 164, 168 (5th Cir. 1999) (discussing the very high standard a plaintiff must meet once an employer articulates a rational justification for the termination).

The judgment of the district court is **AFFIRMED**.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

JOAN CAROL ELLIS ROBERTS,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
TITUS COUNTY MEMORIAL	§	**5:03-CV-21-DF**
HOSPITAL, et al,	§	
Defendants.	§	

FINAL JUDGMENT

Having granted Defendants' Motion for Summary Judgment, filed April 28, 2004 (Dkt. No. 88), it is hereby

ORDERED, ADJUDGED and **DECREED** that Plaintiff's above-entitled and numbered cause of action is **DISMISSED WITH PREJUDICE.**

All pending motions filed by either party not previously ruled on are hereby **DENIED.**

SIGNED this 22nd day of July 2004.

David Folsom
DAVID FOLSOM
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

JOAN CAROL ELLIS ROBERTS,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
TITUS COUNTY MEMORIAL	§	**5:03-CV-21-DF**
HOSPITAL, et al,	§	
Defendants.	§	

ORDER

Before the Court is Defendants' Motion for Summary Judgment, filed April 28, 2004 (Dkt. No. 88). After consideration of the briefing by the parties and the relevant law, the Court finds Defendants' motion to be well-founded and is therefore **GRANTED.**

I. BACKGROUND

This case arises from allegations of deprivation of the Plaintiff's rights of free speech under the First and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. §1983 by: (1) Defendant Titus County Memorial Hospital's ("TCMH" or "Hospital") implementation of a departmental policy based on paragraph 6 of the American Registry of Radiologic Technologists ("ARRT") Code of Ethics ("AART #6") that prohibited Plaintiff from diagnosing and giving medical advice;[1] (2) the Defendant's policy regarding which prohibited the Plaintiff from soliciting employees while she or the employees were on the job; and (3) warning

[1] AART #6 states: "[T]he radiologic technologist acts as an agent through observation and communication to obtain pertinent information for the physician to aid in the diagnosis and treatment of the patient and recognizes that interpretation and diagnosis are outside the scope of practice for the profession." D. Mot. Summ. J., Ex. 6 [hereafter D. Mot.].

notices to Plaintiff to discontinue diagnosing patients and solicitation.

Plaintiff claims she had a constitutional right to diagnose and give medical advice. Plaintiff also claims she had the constitutional right to solicit information from employees while on duty to help her in a lawsuit filed under the Texas Whistleblower laws. Plaintiff had a lawsuit pending in the District Court for Titus County, 76/276th Judicial District, Cause No. 29675, for alleged violations of the Texas Whistleblower Act on which the Court recently granted Defendant summary judgment.

Plaintiff further alleges she was deprived of her Due Process rights under the First and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. § 1983 by the exercise of "the established policies and customs" of the ARRT #6 policy relating to the standard of conduct of radiologic technologists and the Defendant's policy against solicitation while at work.

Plaintiff also alleges she was intentionally discriminated against because of her sex in violation of Title VII, creating an abusive hostile work environment for: (1) exercising her rights to free speech; and (2) filing EEOC charges of sex discrimination. Plaintiff claims an abusive, hostile work environment was created by: (1) George Burns's association with Dr. Davis, Dr. Aydlelott, Adam Larson, Gene Lott, Steve Jacobson, Darrell Beck and Francis Standridge; (2) reprimanding Plaintiff in March and April 2002; (3) unfavorable performance reviews; (4) creation of a new position of Lead CAT Scan Tech and awarding the position to Darrell Beck; (5) unequal treatment of Plaintiff by treating Plaintiff's male co-

worker with different "communicative efforts" and giving the male co-worker "privileges and professional courtesies not afforded plaintiff"; (6) Defendant's policy addresses only sexual harassment and not nonsexual discrimination motivated by gender bias; (7) Defendant's EEOC policy refers to employees, not employers; and (8) George Burns' violation

of Title VII by creating a discriminatory abusive work environment in treating male co-workers differently than Plaintiff. Plaintiff additionally alleges she was retaliated against in violation of Title VII for making an EEOC charge of sex discrimination on December 18, 2001.

II. APPLICABLE LAW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 US. 317, 322 (1986). A dispute regarding a material fact is "genuine" if the evidence would permit a reasonable jury to return a verdict in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). This Court must construe the evidence in the light most favorable to Plaintiff and draw all reasonable inferences in, her favor. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51 (2000).

If the record, taken as a whole, however, could not lead a rational trier of fact to find for the non-moving party, there exists no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986). "This court is not required to 'comb the record' in search of a genuine issue of material fact." Dethrow v. Parkland Health Hosp. Sys., No. 3:00-CV - 2126-D, 2002 U.S. Dist. Lexis 4182, at *4 (N.D. Tex. 2002). "Rule 56 does

not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." Doddy v. Oxy USA, Inc., 101 F.3d 448, 463 (5th Cir. 1996) (citing Jones v. Sheehan, Young & Culp, P.C., 82 F.3d 1334, 1338 (5th Cir. 199)). "Rule 56, therefore, saddles the non-movant with the duty to 'designate' the specific facts in the record that create genuine issues precluding summary judgment, and does not impose upon the district court a duty to survey the

entire record in search of evidence to support a non-movant's opposition." Jones, 82 F.3d at 1338. The nonmovant must go beyond her pleadings and designate specific facts showing there is a genuine issue for trial. Celotex, 477 U.S. at 324.

Once the movant for summary judgment makes a showing that no genuine issue of material fact exists, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish there is a genuine issue of material fact for trial. To carry this burden, the "opponent must do more than simply show. . . some metaphysical doubt as to the material facts." Matsushita Electric, 475 U.S. at 586. Instead, the nonmovant must show that the evidence is sufficient to support a resolution of the factual issue in her favor. Anderson, 477 U.S. at 249.

A party opposing summary judgment may not rest on mere conclusory allegations or denials in its pleadings unsupported by specific facts. Id. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Edwards v. Alamo Rent-A-Car, No. 3:97-CV-2661-R, 1999 U.S. Dist. Lexis 13133 (N.D. Tex. 1999). In the absence of proof, the Court will not assume the nonmoving party could or would prove the necessary facts. Garrity v. Nationsbank of Texas, N.A., No. 3:98 - CV- 0437-H, 1999 U.S. Dist. Lexis 1454 (N.D. Tex. 1999).

III. DISCUSSION

In her Third Amended Petition, filed April 14, 2004 (Dkt. No. 80), Plaintiff asserts violations of her First and Fourteenth Amendment Constitutional rights. In Count 1, Plaintiff claims Defendants violated her rights to free speech by: (1) implementation of a departmental policy entitled ARRT #6 that is unconstitutionally vague; and (2) by letters of warning that required Plaintiff to discontinue her speech. In Count 2, Plaintiff claims Defendants violated her free speech rights with

the promulgation of Defendant's solicitation policy. In Count 3, Plaintiff claims Defendants violated her Due Process rights by terminating her employment without fairly established pre- and post-termination procedures. In Count 4, Plaintiff claims Defendants discriminated against her based on her sex in violation of Title VII. In Count 5, Plaintiff claims Defendants retaliated against Plaintiff for constitutionally protected speech in violation of Title VII. The Court will now address these claims and the arguments of the parties.

A. PLAINTIFF'S FREE SPEECH CLAIMS UNDER COUNT 1 OF THE THIRD AMENDED PETITION

Plaintiff claims in Count 1 of her Third Amended Petition and Response to Defendants' Motion for Summary Judgment that Defendants violated her rights under the First and Fourteenth Amendments to the Constitution in violation of 42 U.S.C. §1983. 3d Am. Pet. at 18; P. Resp. D. Mot. Summ. J. at 6 [hereafter P. Resp.]. In particular, Plaintiff claims a TCMH departmental policy that prohibited Plaintiff from speaking out as a "patient advocate" is unconstitutionally vague as applied to Plaintiff and all x-ray technologists. 3d Am. Pet. at 19; P. Resp. at 6.

1. Vagueness Claim

Plaintiff claims the departmental policy was first conveyed to

Plaintiff during a March 4, 2002, counseling session with George Burns, TCMH Director of Radiology. The counseling record of that session informed Plaintiff that

> interpreting (or giving your opinion) of C.T. scans to physicians is out of your "scope" of practice - this is not the first time you have been told about this. If ask[ed] what you found[,] you are to direct [patients] to the radiologist. See attached ARRT Standards of Ethics. This happened twice on FEB 28[, 2002]. Also[,] a patient reported that you advised her not to follow her physician's advice. Discussing and/or advising a [patient] regarding treatment is clearly out of your scope of practice. If you continue to advise physicians [and] patients regarding outcomes or treatment[,] you may be terminated.

P. Resp., Ex. 3.

On April 9, 2002, Gene Lott, TCMH Director of Human Resources, counseled Plaintiff a second time. D. Mot. Summ. J., Ex. 8 [hereafter D. Mot.]. The counseling letter addressed two issues. The first issue involved non-responses to pages while on call off duty. The second issue involved the unauthorized diagnosing of patients. As stated in the letter from Mr. Lott to Plaintiff,

> The other issue involves you diagnosing patients' problems after they undergo procedures that you performed. Several patients have made complaints in reference to you giving them medical advice. It is not your job nor is it in your scope to diagnose or recommend patient treatment. This type of behavior needs to cease immediately.
>
> This letter will serve as a final warning in reference to both issues addressed in this write-up. Any further violation of this type could result in termination of employment.

Id.

The policy alleged by Plaintiff adopts the language of ARRT #6,

which states: "[T]he radiologic technologist acts as an agent through observation and communication to obtain pertinent information for the physician to aid in the diagnosis and treatment of the patient and recognizes that interpretation and diagnosis are outside the scope of practice for the profession." P. Resp., Ex. 6. (emphasis added). Plaintiff claims the terms "interpretation" and "diagnosis" are vague, not clearly defined by Defendants, and fail to provide persons of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. P. Resp. at 9.

A statute, rule, or policy can be impermissibly vague for either of two independent reasons. The first reason is if the statute, rule, or policy fails to provide people of ordinary intelligence a reasonable opportunity or fair notice to understand what conduct it prohibits. The second reason is if the statute, rule, or policy authorizes or even encourages arbitrary and discriminatory enforcement.

Chicago v. Morales, 527 U.S. 41, 56-57 (1999). "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . .." Giaccio v. Pennsylvania, 382 U.S. 399,402-403 (1966). The purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). Defendants challenge Plaintiff's vagueness argument as improper against TCMH because ARRT #6 is a national guideline for radiology technicians that Plaintiff allegedly has been aware of since its inception. D. Reply to P. Resp. at 3 [hereafter D. Reply]. Defendants argue the departmental policy is based on the Code of Ethics for the American Registry of Radiologic Technologists and that para-graph 6 applies to persons who hold certificates from the ARRT. The ARRT Code of Ethics is provided to serve as a guide

by which Registered Technologists can evaluate their professional conduct as it relates to patients, health care consumers, employers, colleagues, and other members of the health care team. The ARRT departmental policy was provided to Plaintiff, as well as all Registered Technologists at TCMH, as a guideline for the accep table level of professionalism and conduct the hospital would accept.

Defendants further argue the departmental policy simply prohibited plaintiff, and all other similarly situated technicians, from interpreting x-rays or CAT scan results or giving medical diagnoses, which persons such as Plaintiff are not qualified to do. Plaintiff did not attend medical school, is not a licensed medical doctor, nor is a licensed radiologist.

Accordingly, the Court finds the Hospital's policy that prohibited Plaintiff from interpreting x-rays or CAT scan results and diagnosing patients based on x-rays or CAT scan results provides

people of ordinary intelligence a reasonable opportunity or fair notice to understand what conduct the policy prohibits. The policy does not authorize or encourage arbitrary and discriminatory enforcement because people of ordinary intelligence understand that unqualified medical personnel should not interpret x -rays or CAT scan results, diagnose patients, or tell patients not to follow the advice of their doctor. Morales, 527 U.S. at 56-57.

The Hospital policy therefore is not "so vague and standardless" that it leaves radiologic technologists uncertain as to the conduct it prohibits. Ciaccio, 382 U.S. at 402-403. Radiologic technologists, such as Plaintiff, had fair notice of the policy's requirements to enable the technologists to conform their conduct to the policy. Morales, 527 U.S. at 42.

2. Public Concern Claim

Plaintiff's second claim in Count 1 is that her speech as a "patient advocate" involved matters of political, social, or other

concern that are constitutionally protected under the First Amendment. 3d Am. Pet. at 21; P. Resp. at 14. Plaintiff argues that her interest in her speech outweighed the hospital's interest because Plaintiff's was in the best interests of patients' welfare, the public, and the hospital. 3d Am. Pet. at 22. In addition, Plaintiff alleges the warning notices she received on March 4,2002, and April 9, 2002, that ordered her to discontinue activities of diagnosing patients violated her free speech rights as a patient advocate. P. Resp. at 19-20, Ex. 14; D. Mot. Ex. 8. Despite these warnings, Defendants allege Plaintiff continued her behavior.

The First Amendment protects a government employee's speech if the speech is on a matter of public concern and the employee's interest in expressing herself on this matter is not outweighed by any injury the speech could cause to the government's interest, as an employer, in promoting the efficiency of the public services it performs through its employees. Waters v. Churchill, 511 U.S.

661, 667, 671 (1994). Speech involves a matter of public concern when it is made primarily in the speaker's role as a citizen rather than as an employee addressing only matters of personal interest. Connick v. Myers, 461 U.S. 138, 148 (1983).

Connick v. Myers teaches that "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." 461 U.S. at 147. The Court noted that "when employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Id. at 146. Review by a federal court is improper where the speech involves matters of solely personal interest. Id. at 147; see also Ayoub v. Texas A & M University, 927 F.2d 834, 837 (5th Cir. 1991) (holding that a professor's complaint

about a discriminatory pay scale was not a matter of public concern where the professor's complaint focused on his individual compensation).

Against this winnowing of liability the courts have established a limiting principle; the fact that an employee's speech contains an element of personal interest is not fatal. In Thompson v. City of Starkville, Miss., a police officer protested improper promotions by filing grievances and aiding others in filing grievances. 901 F.2d 456 (5th Cir. 1990). The Court held the officer's speech constituted a matter of public concern because his allegations of police misconduct brought attention to matters beyond purely personal interest. Id. at 463 ("The existence of an element of personal interest on the part of an employee in his or her speech does not, however, dictate a finding that the employee's speech does not communicate on a matter of public concern.").

The public nature of the concern is not weakened by the fact that Plaintiff chose to voice her complaint within the organization. In Givhan v. Western Line Consol. School Dist., the Court stated:

> The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

439 U.S. 410, 415-16 (1979).

With regard to the diagnosing of patients, Defendants argue Plaintiff fails to identify any speech that is protected as a matter of public concern which might qualify for First Amendment protection. Defendants argue that in a similar case, the Fifth Circuit in Southern Christian Leadership Conference v. Supreme Court of State of La., 252 F. 3d 781 (5th Cir. 2001), held a Louisiana Supreme Court rule that prohibited non-lawyer students from

representing certain solicited indigent parties as attorneys did not hinder or prevent speech of any kind. Id. at 789-90. Because the rule did not directly regulate speech, the rule did not prohibit speech when there" existed no right among unlicensed law students to practice law. Id. Defendants similarly argue they did not prohibit or regulate Plaintiff s speech when Plaintiff, who is not a licensed physician, had no right to practice medicine by diagnosing patients and provide unsolicited diagnoses to doctors.

In the case at bar, Plaintiff was providing diagnoses to patients that received x-rays and CAT scans and providing unsolicited diagnoses to radiologists. Plaintiff contends that at least once, she has correctly diagnosed a patient based on the x-rays or CAT scans taken of the patient when the radiologist incorrectly diagnosed the patient's condition. For example, Plaintiff alleges she correctly.

diagnosed a patient as having a brain tumor when the radiologist missed the diagnosis after examining the patient's CAT scan results.

The primary interest of hospitals is to ensure patients receive the best quality health care possible. The quality of health care, a patient receives is partly dependent on a hospital's ability to prevent foreseeable acts of negligence that have profound effects on patients' health. Based on the findings of the Fifth Circuit in Southern Christian Leadership Conference, however, the Court must find that Plaintiff's speech was not protected as a matter of public concern. Plaintiff, who is not a licensed physician, had no right to practice medicine by diagnosing patients and provide unsolicited diagnoses to doctors or patients.

Even if the Court had found that Plaintiff's speech touches matters of public concern, Pickering v. Board of Education requires the Court to balance Plaintiff's interest in making her statements against "the interest of the State, as an employer, in promoting the efficiency of public services it performs through its

employees." 391 U.S. 563, 568 (1968). The Court should not consider Plaintiff's statement in a vacuum. Rankin v. McPherson, 483 U.S. 378, 384 (1987). Also relevant is the manner, time, and place in which the speech occurs. As noted in Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979), "Private expression. . . may in some situations bring additional factors to the Pickering calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." Id. at 415, n. 4.

The Supreme Court has recognized as relevant considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working

relationships for which personal loyalty and confidence are necessary, impedes the performance of a speaker's duties, or interferes with the regular operation of the enterprise. Pickering, 391 U.S. at 570-73. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." Rankin, 483 U.S. at 388; Givhan, 439 U.S. at 415, n. 4.

Even if Plaintiff' s speech could generally be categorized as touching on a public concern, the Court finds the Hospital was within its rights to regulate the time, manner, and place of Plaintiff's speech when Plaintiff was not qualified to provide diagnoses. The Defendants therefore properly regulated the manner, time, and place of Plaintiff's speech with the implementation, of the departmental policy using ARRT #6 and the warning notices that required Plaintiff to discontinue her speech.

Defendant is therefore entitled to summary judgment on Count

1 of Plaintiff's free speech claims.

B. PLAINTIFF'S FREE SPEECH CLAIMS UNDER COUNT 2 OF THE THIRD AMENDED PETITION

In Count 2 of the Third Amended Petition, Plaintiff alleges the Defendants' policy regarding solicitation violated her freedom of speech. 3d Am. Pet. at 25-30.; P. Resp. at 16, 18. At the time Plaintiff was provided the Defendants' solicitation policy, Plaintiff was soliciting TCMH employees for information to use in her state Whistleblower lawsuit against TCMH. Plaintiff asserts she was acting under the direction of the Hospital attorney that requested Plaintiff to furnish the attorney with the names, addresses, and telephone numbers of all possible witnesses in the Texas Whistleblower lawsuit as required by law. P. Resp. at 18. The Whistleblower lawsuit involved alleged violations of competitive bidding laws based on events that occurred in the purchase of a CAT scan machine

Plaintiff alleges two causes of action in Count 2. Plaintiff contends the Hospital solicitation policy chilled Plaintiff's political speech relating to the Texas Whistleblower Act amounting to viewpoint discrimination. P. Resp. at 16. Plaintiff also contends her activities in gathering the information needed for the Texas Whistleblower suit rose the level of public concern. Id.

1. Matter of Public Concern

The Texas Whistleblower Act prohibits a state or local governmental entity from taking adverse personnel action against" a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code Ann. § 554.002(a) (Vernon Supp. 2004). The 'Whistleblower Act is designed to enhance openness in government and compel the government's compliance with law

by protecting those who inform authorities of wrongdoing. Hill v. Burnet County Sheriffs Dep't, 96 S. W. 3d 436, 440 (Tex. App.- Austin 2002, pet. denied). The Act evidences two legislative purposes: (1) to protect public employees from retaliation by their employer when, in good faith, employees report a violation of the law, and (2) to secure lawful conduct on the part of those who direct and conduct the affairs of public bodies. City of Austin v. Ender, 30 S. W. 3d 590, 594 (Tex. Ap. - Austin 2000, no pet.); Travis County v. Colunga, 753 S. W. 2d 716, 718-19 (Tex. App. - Austin 1988, writ denied). Because the Act is remedial in nature, it should be liberally construed to effect its purpose. Hill, 96 S. W. 3d at 440.

Accordingly, the Court finds that based on the content, form, and context of statements provided by plaintiffs in pursuit of a Texas Whistleblower Act claim, Connick, 461 U.S. at 147, such statements can be fairly considered as relating to matters of political, social, or other concern to the community. Thus, Plaintiffs statements in pursuit of her Texas Whistleblower Act claims can be

fairly considered as relating to matters of political, social, or other concern to the community. Plaintiff's solicitation activities in the Hospital, however, do not enjoy the same protections as her speech in pursuit of her Texas Whistleblower Act claims.

In response to her solicitation activities, Plaintiff received a memorandum, dated April 9, 2002, from Defendants that stated the following:

> We cannot and will not tell you whom you can or cannot solicit[,] but we can prohibit you from soliciting employees while you are on duty. Additionally, you cannot solicit employees that are on duty.
>
> In other words, you cannot solicit anyone here at the hospital while you and/or they are working. . .

> This should be considered your final warning - any further violations of this nature could result in termination of employment.

D. Mot., Ex. 7. Defendants argue Plaintiff was soliciting employees at the hospital during working hours, disrupting the operation of the hospital, and causing complaints from other employees regarding her solicitation. Id. at 12.

Similarly, the respondent in Connick prepared a questionnaire that she distributed to other persons in her office concerning an office transfer policy, office morale, need for a grievance committee, level of confidence in supervisors, and whether employees felt pressure to work in political campaigns. Connick, 461 U.S. at 141. The Court held that except for the question regarding pressure upon employees to work in political campaigns, questions posed in the questionnaire did not fall under rubric of matters of "public concern." Id. at 148. The Court further held the respondent's distribution of the questionnaire threatened the functioning of the office. Id. at 151. The government agency's institutional efficiency was threatened not only by the content of the employee's message, but also by the manner, time, place in which it was delivered. Id. at 153.

The termination of the employee's employment therefore did not offend the First Amendment. Id. at 154.[2]

Accordingly, while the Court finds Plaintiff's statements in pursuit of her Texas Whistleblower Act claims against the Hospital can be fairly considered as relating to matters of political, social, or other concern to the community, Plaintiff's solicitation activities cannot. Plaintiff was certainly free to contact employees after working hours when both Plaintiff and the employees were not working. Defendants, however, were within their rights to regulated the manner, time, and place of Plaintiff's solicitation

activities to the extent Plaintiff's activities disrupted the efficiency of the Hospital's goal of treating patients.

2. Viewpoint Discrimination

In order for Plaintiff to show viewpoint discrimination in violation of the First Amendment, Plaintiff must show that Defendants discriminated against Plaintiff based on constitutionally protected speech. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995). In determining whether a state is acting to preserve the limits of a forum it has created so that exclusion of a class of speech is legitimate, there is a distinction between content discrimination,

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[2] As Justice Powell explained in his separate opinion in Arnett v. Kennedy, 416 U.S. 134, 168 (1974):

> To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Id. (cited in Connick, 461 U.S. at 151).

which may be permissible if it preserves the purpose of the limited forum, and viewpoint, discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. Id. at 829-30.

According to Plaintiff, the Hospital solicitation policy defines working time as the following: "Working time does not include break periods, meal times, or other specified periods during the work day when employees are properly not engaged in performing their work tasks." 3d Am. Pet. at 26. Plaintiff asserts she approached Hospital co-workers when she or they were not

working. Id.; P. Resp. at 18. Plaintiff also asserts the solicitation policy was selectively enforced against Plaintiff to chill Plaintiff's undesirable speech. 3d Am. Pet. at 27; P. Resp. at 16.

Defendants argue Plaintiff was soliciting employees at the hospital during working hours, disrupting the operation of the hospital, and causing complaints from other employees regarding her solicitation. D. Mot. at 12. The Hospital was not a public or limited public forum, and according to Defendants, Plaintiff continued her solicitation, despite the fact she had been warned to cease her behavior. Id.

Defendants therefore terminated Plaintiff's employment on June 14, 2002. The termination letter stated,

> On April 10, 2002, you received two different written final warnings. The subject areas covered in that counseling were solicitation of employees, on call responsibility and diagnosing patients' problems and giving them medical advice.
>
> Since that meeting on April 10, 2002, you have violated the terms of that counseling session. Our information reflects that not only did you violate these terms, you, violated them several times in the areas of soliciting employees and diagnosing patients' problems and giving medical advice.
>
> As a result of these willful violations we are terminating your employment with TCMH effective immediately.

D. Mot., Ex. 1.

Plaintiff argues that specific facts were never revealed to her, such as: a) the names of people to whom she allegedly solicited; b) the specific details of her speech that classified it as solicitation as opposed to conversation; c) when the alleged actions took place; d) the names of people who allegedly complained; and e) the form of the alleged complaints. P. Resp. at 17. In response

Defendants rely on the language of Waters where the Court stated:

> [E]mployers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct. What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to
>
> credit the allegation more if it is consistent with what the manager knows of the character of the accused. Likewise, a manager may legitimately want to discipline an, employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay.
>
> It is true that these practices involve some risk of erroneously punishing protected speech. The government may certainly choose to adopt other practices, by law or by contract. But we do no believe that the First Amendment requites it to do so. Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability.

Waters, 511 U.S. 676-77; D. Mot. Summ. J. at 16.

Accordingly, in addition to the Court's finding that Plaintiff's solicitation activities do not rise to the level of a public concern, the Court finds the Hospital did not create a publie or limited public forum for Plaintiff' s solicitation activities. As earlier stated, Plaintiff was free to contact employees after employment hours when both Plaintiff and the employees were not working. In prohibiting Plaintiff's solicitation activities, however, Defendants acted to preserve the purpose of the Hospital's business in treating patients. As Such, no viewpoint discrimination occurred on the

part of the Defendants when Defendants restricted the manner, time, and place of Plaintiff's solicitation activities. Defendant is therefore entitled to summary judgment on Count 2 of Plaintiff's free speech claims.

C. PLAINTIFF'S DUE PROCESS CLAIMS UNDER COUNT 3 OF THE THIRD AMENDED PETITION

Plaintiff alleges in Count 3 of the Third Amended Petition that Defendants failed to provide constitutionally adequate safeguards, including a fair and impartial pre- or post-termination hearing and/or post termination appeal procedures, before and after they terminated Plaintiff's employment. 3d Am: Pet. at 30 -34. In Plaintiff's Response, Plaintiff alleges Substantive and Procedural Due Process violations. P. Resp. at 22-25. Plaintiff further alleges that Defendants' implementation of ARRT #6 and the solicitation policy was a substantial motivating factor in Plaintiff's termination that occurred without a reasonable notice, good-faith investigation, and/or a hearing. 3d Am. Pet. at 32-33; P. Resp. at 22-25. Plaintiff also alleges that according to the By Laws of the hospital, Defendants could only terminate Plaintiff's employment for "good cause." P. Resp. at 25; Ex: 15.[3]

When a person has a property right in continued employment, that right may not be deprived, without due process. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). The Constitution, however, does not create property interests. "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). "To have a property interest

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[3] Article XI - ADMINISTRATOR of the Titus County Regional Medical Center,

Titus County MemorialHospital, Board of Managers Bylaws states: "... [the Administrator] shall supervise the work of all employees and shall assign to the employees their respective tasks and duties and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal." P. Resp., Ex. 15 (emphasis added).

in a benefit, a person clearly must have more than an abstract need or desire for it. [She] must have more than a unilateral expectation of it. [She] must, instead, have a legitimate claim of entitlement to it." Id. A property interest can arise from such interests as a mutually explicit understanding or an express contract. Perry v. Sindermann, 408 U.S. 593, 601 (1972). This Court determines whether Plaintiff had a protected property interest by reference to state law. Bishop v. Wood, 426 U.S. 341, 344 (1976).

Texas state courts uniformly embrace the notion that employee handbooks or manuals, standing alone, "constitute no more than general guidelines," absent express reciprocal agreements addressing discharge protocols. Reynolds Mfg. Co. v. Mendoza, 644 S. W. 2d 536, 539 (Tex. App. 1982); see also, Ryan v. Superior Oil Co., 813 S. W. 2d 594, 596 (Tex. App. 1991); Hicks v. Baylor Medical Univ. Med. Center, 789 S. W. 2d 299, 302 (Tex. App. 1990); Benoit v. Polysar Gulf Coast, Inc., 728 S. W. 2d 403, 406 (Tex. App. 1987); Vallone v. Agip Petroleum Co., 705 S. W. 2d 757, 759 (Tex. App. 1986); Totman Y. Control Data Corp., 707 S. W. 2d 739, 744 (Tex. App. 1986); Molder v. Southwestern Bell Tel. Co., 665 S. W. 2d 175 (Tex. App. 1983).

The foregoing cases all illustrate the consistency with which Texas courts have adhered to the employment-at-will doctrine first enunciated in Eastline & R.R.R. Co. v. Scott, 72 Tex. 70, 75, 10 S. W. 99, 102 (1888). The ineluctable conclusion that under Texas law employment manuals generally do not create contract rights helps guide this Court's resolution of whether Plaintiff's property interest claim fails.

It has been an elementary requirement in employment law for

almost two decades that in order to bring a claim for deprivation of a property right, a plaintiff must clearly establish the existence of a property interest. Bishop v. Wood, 426 U.S. 341, 343-47 (1976); Brown v. Texas A

& M University, 804 F. 2d 327 (5th Cir. 1986). The Fifth Circuit has been clear that to demonstrate a constitutionally protected property interest, a plaintiff must "allege with specificity the particular state rule, regulation, law or understanding between the parties giving rise to the requirement of just cause prior to termination." Brown, 804 F.2d at 334. Mere conclusory allegations that one has been deprived of a property interest in continued employment is insufficient to establish the existence of a constitutionally protected interest. Id.

The Fifth Circuit requires three points to be alleged with particularity in order to bring a due process claim: "(i) the state or federal law or understanding giving rise to the property interest; (ii) the particular process that plaintiff was entitled to and failed to receive; and (iii) that the official's failure to provide these particular processes violated 'clearly established constitutional law' at the, time of the alleged infraction." Brown, 804 F.2d at 333. Defendants argue Plaintiff has failed to allege iny one of these three requirements.

Arguing the case of Spuler v. Pickar, 958 F.2d 103, 106 (5th Cir. 1992), Defendants state that "[p]ublic employees must demonstrate a property right founded on a 'legitimate claim of entitlement' based on 'mutually explicit understandings.'" Id. (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1976); see also Perry v. Sindermann, 408 U.S. 593, 601 (1972)). In Spuler, a university professor allegedhe had a reasonable expectation of achieving tenure based upon a faculty handbook provision. Id. at 105. The Fifth Circuit found the faculty handbook provision did not create a protectible property interest, citing the foregoing

Texas state case law on employee handbooks and manuals. Id. at 106-07. The faculty handbook was found not to be a written employment agreement or a written representation of termination procedures and was not supplemented or supplanted by any express agreement or written representation. Id. at 107. It bestowed no contactual rights on the

professor and no concomitant obligations on the university. Id. Because the professor pointed to no other source of entitlement to tenure, he enjoyed no property interest. Id. Without a property interest, the professor was entitled to no procedural or substantive due process protection. Id.

Like the plaintiff in Spuler, Defendants argue Plaintiff in this case has failed to show with specificity any particular state rule, regulation, law, or understanding between Plaintiff and Defendants that granted Plaintiff a constitutional right to continued employment. According to Defendants, Plaintiff has failed to show any "mutually explicit understandings," written employment agreement, or representation between herself and the Defendants that created a property right entitled to due process consideration. Plaintiff, however, relies on the Hospital's By Laws that indicate the Hospital Administrator could only terminate Plaintiff's employment for "good cause." P. Resp. at 25, Ex. 15.

Defendants argue "Texas law imposes a strong presumption in favor of at-will employment." Zenor v. El Paso Healthcare System, Ltd., 176 F. 3d 847, 862 (5th Cir. 1999) (citing Montgomery County Hospital District v. Brown, 965 S. W. 2d 501 (Tex. 1998)); Sabine Pilot Service v. Hauck, 687 S. W. 2d 733 (Tex. 1985) (Texas Supreme Court has been unfailingly clear that employment in this state is assumed to be "at will" unless otherwise shown.). In limited circumstances, employment policies may alter the at-will nature of the employment relationship and create enforceable contractual rights. Id. But to do so, "the policy must specifically

and expressly limit the employer's ability to terminate the employee." Id. "The policy must contain an explicit contractual term altering the at-will relationship, and must alter that relationship 'in a meaningful and special way.'" Id. (quoting Figueroa v. West, 902 S. W. 2d 701, 705 (Tex. App. 1995)). In fact, "Texas courts have been reluctant to imply contractual rights from non-explicit statements or employment policies." Id.

Accordingly, the Court finds that Plaintiff has failed to show: (i) a state or federal law or understanding between Plaintiff and Defendants that give rise to a protected property interest; (ii) a particular process that Plaintiff was entitled to and failed to receive; and (iii) that the Defendants' alleged failure to provide particular processes to Plaintiff violated clearly established constitutional law before or after Defendants terminated Plaintiff's employment. Without a written contract between Plaintiff and Defendants, Plaintiff cannot show that she was a "for cause" employee. As such, the Court must presume Plaintiff was an "at -will" employee when the Hospital's By-Laws could not alter Plaintiff's employment status as an at-will employee without reference to the By-Laws in an employment contract.

Plaintiff additionally alleges she was deprived of her constitutionally protected property interest rights of continued employment when Defendants violated her Due Process rights to fair notice "and pre- and post-termination procedures. P. Resp. at 22-25. There exists no federal constitutionally protected interest in future employment. Muniz v. City of Harlingen, 247 F. 3d. 607, 608-09 (5th Cir. 2001). It is, however, a fundamental principle of constitutional law that "if the individual employee has not been granted a term of guaranteed employment, absent removal for just cause; [s]he will have no property right or entitlement to continued employment in that position." Gonzales v. Galveston Indep. Sch. Dist., 865 F. Supp; 1241, 1249 (S.D. Tex. 1994) (citing

NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW (3rd ed. 1986)). Defendants argue because Plaintiff had not been granted a term of guaranteed employment, she did not possess a property right or entitlement to continued employment in her position.

Moreover, the failure to prove a First Amendment claim is fatal to a Substantive Due Process claim when the Plaintiff alleges she was discharged for exercising her right to free speech. Fowler

v. Smith, 68 F.3d 124, 128 (5th Cir. 1995); Thompson v. Bass, 616 F. 2d 1259, 1268 (5th Cir.), cert. denied, 449 U.S. 983 (1980). Such is the case here. Plaintiffs Substantive Due Process claim is "based primarily on" the factual allegations underlying her First Amendment claims. Thompson, 616 F. 2d at 1268. The arbitrary and capricious actions of which Plaintiff complains were allegedly motivated by speech that enjoys no constitutional protection. Defendants are therefore entitled to summary judgment on Count 3 of Plaintiff' s Due Process claims.

D. PLAINTIFF'S TITLE VII DISCRIMINATION CLAIM UNDER COUNT 4 OF THE THIRD AMENDED PETITION

Title VII makes it "an unlawful employment practice for an employer. . . to discharge. . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . [or] sex. . . ." 42 U.S.C. § 2000e-2(a)(l). "The Title VII inquiry is 'whether the defendant intentionally discriminated against the plaintiff.'" Johnson v. Louisiana, 351 F. 3d 616, 621 (5th Cir. 2003) (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983)). In order to withstand summary judgment, Title VII requires that Plaintiff, using direct or circumstantial evidence, "present sufficient, evidence for a reasonable jury to conclude. . . that 'race, color,

religion, sex, or national origin was a motivating factor for any employment practice.'" Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m)).

Where there is no direct evidence of sex discrimination, the Court must apply a three-step analysis utilized by the Supreme Court. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-12 (1993); Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-58 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Hanchey v. Energas Co., 925 F. 2d 96, 97 (5th Cir.

1990). Direct evidence, in the employment discrimination context, is "evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." Mooney v. Aramco Servs .Co., 54 F. 3d 1207, 1217 (5th Cif. 1995) (quoting Brown v. East Miss. Elec. Power Ass'n, 989 F. 2d 858, 861 (5th Cir. 1993).

In the first step, the plaintiff must establish a prima facie case of discrimination. Portis v. First Nat'l Bank of New Albany, MS, 34 F. 3d 325, 328 (5th Cir. 1994). If the plaintiff presents a prima facie case, a presumption of discrimination arises. Bodenheimer v. PPG Industries, Inc., 5 F. 3d 955, 957 (5th Cir. 1993). At the second step, the defendant can rebut this presumption of discrimination by offering a legitimate, nondiscriminatory reason for the employment decision of which the plaintiff complains. Id. If the defendant satisfies this burden of production, the plaintiffs prima facie case dissolves and the case proceeds to the third step of the analysis. Id. At this third stage, the burden is on the plaintiff to prove that the reasons offered by the defendant are pretexts for sex discrimination. Id.

When the analysis has proceeded to the third step, the plaintiff – to avoid summary judgment – must produce evidence from which a reasonable factfinder could find "that the employer's reasons were not the true reason for the employment decision and that unlawful discrimination was." Id. Accord Moore v. Eli Lilly

& Co., 802 F. Supp. 1468, 1471-74 (N.D. Tex. 1992), aff'd, 990 F. 2d 812, 816 n. 24 (5thCir.), cert. denied, 510 U.S. 976 (1993); Waggoner v. City of Garland, 987 F. 2d 1160, 1166 (5th Cir. 1993); St. Mary's, 509 U.S. at 507-08.

Plaintiff may establish a violation of Title VII by demonstrating that discrimination based on sex has created a hostile or abusive work environment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993); Meriror Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986). To set forth a prima facie

claim of actionable harassment in the workplace, Plaintiff must produce evidence that: (1) she belongs to a protected group; (2) she experienced unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition or privilege" of employment; and (5) the city knew or should have known of the harassment and failed to take prompt remedial action. Shepherd v. Comptroller of Public Accounts for the State of Texas, 168 F. 3d 871, 873 (5th Cir. 1999).

To establish a prima facie case of sex discrimination based on disparate treatment, Plaintiff must show: (1) that she is a member of a protected class; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) others similarly situated were more favorably treated. Urbano v. Continental Airlines, Inc., 138 F. 3d 204, 206 (5th Cir. 1998). To survive summary judgment, Plaintiff must adduce specific facts showing a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Conclusory evidence is insufficient to demonstrate that Defendants treated similarly situated employees more favorably than they treated Plaintiff. Id.

Title VII was designed to address only ultimate employment decisions, not every decision made by employers that might have some tangible effect upon those ultimate decisions. Dollis v. Rubin, 77 F. 3d 777, 781-82 (5th Cir. 1995). "Ultimate employment

decisions"-include acts such as hiring, granting leave, discharging, promoting, and compensating an employee. Id. at 782. They do not include anything that might jeopardize employment in the future, such as disciplinary filings, supervisor's reprimands, and poor performance by the employee. Mattern v. Eastman Kodak Co., 104 F. 3d 702, 708 (5th Cir.). To hold otherwise would impermissibly expand the definition of "adverse employment action" to include actions that may have had a tangential effect on conditions

of employment. Id.

Plaintiff alleges that Defendants discriminated against Plaintiff because of her sex in violation of Title VII and created an abusive, hostile work environment by: (1) Defendant George Burns's association with the Dr. Davis, Dr. Aydlelott, Adam Larson, Gene Lott, Steve Jacobson, Darrell Beck, and Francis Standridge; (2) reprimanding Plaintiff in March 4, 2002, and April 9, 2002; (3) unfavorableperformnance reviews; (4) creation of a new position of Lead CAT Scan Tech and awarding the position to Darrell Beck; (5) unequal treatment of Plaintiff by treating Plaintiff's male co-worker with different "communicative efforts" and giving the male co-worker "privileges and professional courtesies not afforded plaintiff; (6) Defendants' nondiscrimination policies address only sexual harassment and not nonsexual discrimination motivated by gender bias; (7)Defendants' Equal Employment Opportunity Commission ("EEOC") policy refers t.o employees, not employers; and (8) George Burns's violation of Title VII by creating a discriminatory, abusive work environment in treating male co-workers differently than Plaintiff. 3d Am. Pet. at 35-46; P. Resp. at 25-26.

Defendants argue Plaintiff's allegations, (1) to (3) and (5) to (8) above, must fail as Plaintiff has not stated specific facts showing a genuine issue, and it is difficult to determine with certainty

what issues Plaintiff alleges.

With regard to Plaintiff's fourth allegation, Defendants argue that Plaintiff must first prove a prima facie case of discrimination. When an individual infers discrimination from an employer's failure to promote her, courts apply a modified version of the burden-shifting analysis. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e -16(c), a plaintiff alleging a discriminatory hiring practice bears the burden of proving a prima facie case that the defendant made an

employment decision that was motivated by a protected factor. Scales v. Slater, 181 F. 3d 703, 709 (5th Cir. 1999). A Court in a failure-to-promote case applies similar criteria as a case of sex discrimination based on disparate treatment that a plaintiff must demonstrate that: (1) she is a member of a protected class; (2) she sought and was qualified for an available employment position; (3) she was rejected for that position; (4) the employer continued to seek applicants with the plaintiffs qualifications. Id. Plaintiff must establish four elements of the case in order to prove that she was treated differently. Id.

Defendants acknowledge Plaintiff is a member of a protected class in that she is female. However, as Defendants assert, the analysis must continue from there. Plaintiff alleges that a new position was intentionally created to punish her for her "Whistleblowing activities" and that she was not allowed to apply for this new position. P. Resp. at Under the second step of the Scales analysis, Plaintiff must prove there was an available employment position. However, according to Defendants, no new position was created.

As argued by Defendants, TCMH Radiology Management made the dicision that with the addition of a new CT machine, there existed a need for one of the existing CT Technologist to be assigned "additional duties" and to designate that person as

"Lead Tech." There was no promotion or increase in pay. Each of the three CT Technologists, including Plaintiff, were considered for these duties. Darrell Beck was assigned as Lead Tech due to ability to expedite patient schedules, to interact effectively with the radiologists, and to communicate with patients and their families. Beck had also exhibited significantly superior people and organizational skills, and was the only veteran technologist who had the added credentials of CT registry (at that time). Therefore, according to Defendants, Plaintiff's claim must fail as she has failed to prove an essential element

of her claim when, in fact, no newly created employment position was available. Furthermore, as Defendants argue, even if a new position was created, Plaintiff cannot show she was qualified for the position. The duties set forth in the "Lead Tech" position included coordination of scheduling, emergency procedures, communications, and maintaining acceptable interpersonal relationships (including communicating with the hospital's radiologists). According to Defendants, Plaintiff lacked the skills to effectively carry out the additional duties that would be required of a lead position. She was unable to coordinate scheduling in an appropriate manner and communicate effectively with the radiologists. Plaintiff had problems with her behavior, management, and with her co-workers. Additionally, Plaintiff's interpersonal skills, which were considered essential for the additional duties of the "Lead" technologist, were below normal.

Plaintiff scored low on her performance evaluations on her relationships with others and her conduct and compliance with policies on her performance evaluation dated March, 13, 2001. D. Mot. Summ. J., Ex. 15. She also scored low on her relationships with others, initiative and judgment, and conduct and compliance with policies on her performance evaluation dated November 23, 2001. Id. at Ex. 14.

Plaintiff was not suited to handle the additional duties that the lead technologist would have to deal with on a daily basis. This is also evidenced as early as 1992 when Plaintiff was evaluated by Nellie Viola, M.S., L.P.C. Ms. Viola stated that Plaintiff has a "history of numerous conflicts with her supervisors" and "the conflicts have persisted in spite of management changes." Ms. Viola further stated that Plaintiff has a tendency to "project blame onto others." In a second evaluation, dated September 22, 1992, Viola further stated that Plaintiff" sees herself as a victim of persecution" and "it is possible that she is not suited for working on a team of x-ray technicians because of some

temperament characteristics." Id. at Ex. 16. According to Defendants, Plaintiff exhibited these same characteristics while working at Titus. Thus, as argued by Defendants, the foregoing information evidences that Plaintiff was not the best qualified for the duties of Lead Tech.

In the instant case, Plaintiff has proffered no evidence of discriminatory motive, and therefore has not raised the requisite factual issues to survive Defendants' motion for summary judgment. Plaintiff's own affidavit, P. Resp., Ex. 1 , regarding the terms and nature of her employment, her job title and description, her performance, her credentials, and the credentials of Darrell Beck, as well as the actions of George Bums and Gene Lott, contains nothing that raises an inference of discriminatory intent on the part of the defendants. Likewise, Plaintiff's subjective beliefs that she was not selected for the new Lead Tech position based upon her sex is also insufficient to create an inference of the Defendants' discriminatory intent. Indeed, "a subjective belief of discrimination, however genuine [may not be the basis of judicial relief." Lawrence v. Univ. of Tex. Med. Branch at Galveston, 163 F. 3d 309, 313 (5th Cir.1999); see also Ramsey v. Henderson, 286 F. 3d 264, 269 (5th Cir. 2002) ("This Court has cautioned that

conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden in a motion for summary judgment.") (quotation omitted).

In sum, Plaintiff has failed to present any evidence under Count 4 that forbidden characteristics played a role in Defendants' decisions. Rubinstein v. Adm'rs of Tulane Educ. Fund, 218 F. 3d 392, 400 (5th Cir. 2000) (affirming grant of summary judgment based on "overall lack of any evidence of discriminatory intent"). Defendants are therefore entitled to summary judgment on Count 4 of Plaintiff's Title VII discrimination claims.

E. PLAINTIFF'S TITLE VII RETALIATION CLAIM UNDER COUNT 5 OF THE THIRD AMENDED PETITION

In Count 5 of Plaintiff's Third Amended Petition, Plaintiff alleges Defendant retaliated against her for: (1) exercising her rights to free speech; and (2) filing an EEOC charge of sex discrimination. 3d Am. Pet. at 47-53; P. Resp. at 27-28.

Title VII makes it "an unlawful employment practice for an employer to discriminate against any of his employees. . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter. . ." 42 U.S.C. § 2000e-3(a). Similarly, a governmental entity may not retaliate against a public employee for exercising his constitutional right to freedom of expression. Rankin v. McPherson, 483 U.S. 378, 383 (1987); Wallace v. Texas Tech Univ., 80 F. 3d 1042, 1050 (5th Cir. 1996). However, there are limitations on a public employee's right to free speech in the workplace. Blackburn v. City of Marshall, 42 F. 3d 925, 931 (5th Cir.-1995).

1. Retaliation Based on Free Speech

The Fifth Circuit has developed a three-part test in First Amendment retaliation cases brought by public employees. The employee must establish that: (1) the speech involves a matter of public concern; (2) the employee's interest in commenting on the

matter outweighs the employer's interest in promoting efficiency; and (3) the exercise of free speech was a substantial or motivating factor in the adverse employment action. Denton v. Morgan, 136 F. 3d 1038, 1042 n. 2 (5th Cir. 1998) (citing Thompson v. City of Starkville, Miss., 901 F.2d 456, 460 (5th Cir. 1990). An adverse finding at any stage of this test is conclusive and terminates the analysis. Coughlin v. Lee, 946 F. 2d 1152, 1156-57 (5th Cir. 1991).

First, retaliation by an employer for an employee's speech is actionable only if the speech addressed is a matter of public concern. Speech involves a matter of public concern when it is made

primarily in the speaker's role as a citizen rather than as an employee addressing only matters of personal interest. Connick, 461 U.S. at 148-49 ("The First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."); but see Benningfield v. City of Houston, 157 F. 3d 369, 375 (5th Cir. 1998) ("The fact that an employee's speech contains an element of personal interest is not fatal, however."). The primary motivation of the speaker is determined by the "content, form, and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-48.

Plaintiff alleges she was retaliated against for exercising her free speech relating to the solicitation policy, making medical diagnoses, and giving medical advice. P. Resp. at 28. Because the Court has found that Plaintiff's speech relating to the solicitation policy, making medical diagnoses, and giving medical advice does not rise to the level of a public concern, Plaintiff has failed to prove the first prong of the Denton analysis. Accordingly, the Court need not determine the final two prongs of the analysis of: (2) whether the Plaintiff's interest in commenting on the matter outweighs the Defendant's interest in promoting efficiency; and

(3) whether the exercise of free speech was a substantial or motivating factor in the adverse employment action that terminated Plaintiff's employment.

Because Defendants operate a hospital for the public, they have a duty to the public to operate the hospital in an efficient and responsible manner. Protecting the public from an unqualified individual making medical diagnoses and giving medical advice to patients far outweighs any right the Plaintiff claims to have in giving her opinions regarding medical advice.

Additionally, Defendant has the right, as an employer, to prevent actions by an employee that would disrupt the work environment, undermine authority, and destroy close working

relationships within the work environment. Connick, 461 U.S. at 148. Therefore, the Defendant's right to maintain a non-disruptive and efficient work environment outweighs any right Plaintiff could possibly have in soliciting employees while at work.

2. Retaliation for EEOC Charge of Sex Discrimination

For Plaintiffs second claim of retaliation for filing an EEOC charge of sex discrimination, this Court applies the three-step analysis utilized by the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), to analyze Plaintiff's claims of discriminatory retaliation. Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1121-22 (5th Cir. 1998); Long v. Eastfield College, 88 F. 3d 300, 304 (5th Cir. 1996). If Plaintiff establishes a prima facie case of retaliation, a presumption of discrimination arises, and the Defendants must articulate a legitimate, non-discriminatory reason for the employment action of which Plaintiff complains. Sherrod, 132 F. 3d.at 1122; Long, 88 F. 3d at 304-05; Grizzle v. Travelers Health Network Inc., 14 F. 3d 261, 267 (5th Cir. 1994). If Defendants satisfy their burden of production, Plaintiff must prove the ultimate issue of retaliation by showing that the reason offered is "a pretext for prohibited discrimination.

Sherrod, 132 F. 3d at 1122; Long, 88 F. 3d at 305; Grizzle, 14 F. 3d at 267.

To establish a prima facie case of retaliation, Plaintiff must show that (1) she engaged in an activity protected under Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the protected activity and the adverse employment decision. Shirley v. Chrysler First, Inc., 970 F. 2d 39, 42 (5th Cir. 1992); Collins v. Baptist Memorial Geriatric Center, 937 F. 2d 190, 193 (5th Cir. 1991). The causal connection required is cause-in-fact or "but for" causation. Jack v. Texaco Research Center, 743 F. 2d 1129;, 1131 (5th Cir. 1984).

Defendants admit Plaintiff made complaints and Plaintiff's employment was terminated. However, Defendants argue there was no causal connection between Plaintiff's EEOCclaim and the termination of Plaintiffs employment. To establish a causal link between Plaintiff's EEOC claim and the termination of Plaintiff's employment, Plaintiff must show that "but for" the protected activity, she would not have been terminated. In other words, Plaintiff must show that the termination would not have occurred, notwithstanding the other reasons advanced by the Defendants. McMillan v. Rust College, Inc., 710 F. 2d 1112 (5th Cir. 1983).

Plaintiff filed an EEOC claim alleging sex discrimination on December 18, 2001. D. Mot. Summ. J., Ex. 5. The EEOC did not pursue this claim. Plaintiff nevertheless was terminated on June 14, 2002, for refusing to follow her employer's instructions despite repeated warnings to do so. There was a period of six months between the EEOC claim and Plaintiffs termination. This period is to long to create an inference of retaliation. Monroe v. Oncor Energy Delivery Company, No. 3-01-CV-1012-D, 2003 U.S. Dist. Lexis 14728 (N.D. Tex. 2003) (15 month delay too attenuated to support an inference of retaliation); see also Sowell v. Alumina

Ceramics, Inc., 251 F. 3d 678, 685 (8th Cir. 2001) (seven month lapse too long for incidents to be temporally and causally related); Richmond v. ONEOK, Inc., 120 F. 3d 205, 209 (10th Cir.1997) (three month period insufficient to establish a causal connection); Grizzle v. Travelers Health Network, Inc., 14 F. 3d 261, 268 (5th Cir. 1994) (lapse often months between protected activity and subsequent adverse employment action suggests that retaliatory motive was "highly unlikely")

Defendants argue that even if Plaintiff were to establish a prima facie case of retaliation, Defendants had a legitimate, non-discriminatory reason for the employment action of which Plaintiff complains. Plaintiff was soliciting employees and diagnosing patients' problems and giving them

medical advice despite warnings not to do so. Plaintiff had been warned that continuing such actions was grounds for dismissal. The failure of a subordinate to follow the direct order of a supervisor is a legitimate nondiscriminatory reason for discharging that employee. Accordingly, in a case in which the employer has articulated a rational justification for terminating an employee, the task of proving pretext becomes quite difficult. Chancy v. New Orleans Public Facility Management, Inc., 179 F. 3d 164, 168 (5th Cir. 1999).

Defendants argue Plaintiff's direct refusal to follow the direct orders of her employer, despite numerous warnings to do so, was justifiable grounds to terminate Plaintiff. Plaintiff's termination was based on her failure to follow the orders of her employer. Defendants, therefore, argue Plaintiff has failed to show pretext, or that "but for" her EEOC charge, she would not have been terminated. As such, Plaintiff's claim of retaliation must fail and Defendants are entitled to summary judgment on Count 5 of Plaintiff's Title VII retaliation claims.

IV. CONCLUSION

The Court recognizes that Plaintiff had in mind the best interests of her patients and the Hospital when she attempted to assist patients and doctors with the diagnosis of x-rays and CAT scans and when she filed her Whisleblower lawsuit. Plaintiff was employee of Titus County Memorial Hospital for sixteen years and worked full-time in the Radiology Department as a CAT Scan Technologist. She is a 1973 graduate of the Parkland Memorial Hospital School of X-ray where she was the outstanding scholastic student and received the Mallinckrodt Award for outstanding performance. In the State of Texas, Plaintiff is licensed through the Texas Department of Health as a Medical Radiologic Technologist to work in Radiology. Plaintiff is listed on the post primary CT registry of the ARRT. On performance evaluations, Plaintiff received high marks for

the quality of her radiographs.

The Court nevertheless must find Plaintiff's claim of violation of her right to free speech under Counts 1 and 2 of the Third Amended Petition fails as Plaintiff's "speech" was a matter of personal opinion and benefit, not a matter of public concern. Plaintiff failed to identify specific "speech" which she believes was protected. Furthermore, any interest Plaintiff may have had in diagnosing patients and soliciting employees is outweighed by the hospital's interest in protecting its patients from someone not authorized to make medical diagnoses and in promoting hospital efficiency.

Plaintiff's claim of violation of her due process rights under Count 3 of the Third Amended Petition resulting in the deprivation of her constitutionally protected property interest in continued employment fails. Plaintiff did not have an employment contract or agreement of any kind with Defendants. Plaintiff did not have a protected interest, and, therefore, no process was due.

Furthermore, Plaintiff's failure to prove a U.S. Constitutional Amendment I claim is fatal to a substantive due process claim.

Plaintiff's claim of violation of Title VII by alleged discrimination under Count 4 of the Third Amended Petition because of her sex also fails as Plaintiff has not stated any specific facts showing a genuine issue or that Plaintiff was treated differently than male employees in similar circumstances. Plaintiff's claim of sex discrimination relating to her failure to be promoted to the Lead Tech position also fails. First, Plaintiff has not shown there was any new position created. Second, Plaintiff has not shown that she was discriminated against because of her sex rather than decisions, made based upon her qualifications and ability to work with others.

Lastly, Plaintiff's claim of Title VII retaliation for exercising her right of free speech under Count 5 of the Third Amended Petition fails as the Plaintiff has not shown her speech qualified for protection in that it was a matter of private rather than public concern. The disruptive nature of Plaintiff's speech outweighed any interest she may have had in making such speech. Additionally, Plaintiff's claim of retaliation for filing an EEOC claim fails as Plaintiff has not shown she would not have been terminated "but for" her filing the EEOC claim.

Based on the foregoing, the Court therefore **ORDERS** that Defendants' Motion for Summary Judgment, filed April 28, 2004 (Dkt. No. 88) is **GRANTED.**

SIGNED this 22nd day of July 2004.

David Folsom
DAVID FOLSOM
UNITED STATES DISTRICT JUDGE

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. Court of Appeals
FILED
June 1, 2005
Charles R. Fulbruge III
Clerk

No. 04-41101

JOAN CAROL ELLIS ROBERTS,
Plaintiff-Appellant,

v.

TITUS COUNTY MEMORIAL HOSPITAL; GEORGE BURNS, Director of Radiology Titus County Memorial Hospital; GENE LOTT, Director of Human Resources Titus County Memorial Hospital,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas, Texarkana

ON PETITION FOR REHEARING

Before JONES, BARKSDALE, and PRADO, Circuit Judges.
PER CURIAM:
IT IS ORDERED that the petition for rehearing is *denied*.

ENTERED FOR THE COURT:

Edith H. Jones
United States Circuit Judge
REHG - 2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX 4

TITUS REGIONAL MEDICAL CENTER

TITUS COUNTY MEMORIAL HOSPITAL [APP 4A]

BOARD OF MANAGERS
BYLAWS

ARTICLE I - OFFICES:

The name of the hospital shall be "Titus County Memorial Hospital". It shall be operated by the Titus Regional Medical Center. The principal office of the hospital and the hospital district shall be at 2001 North Jefferson Street in Mount Pleasant, Texas.

ARTICLE II - PURPOSE:

The general purpose of the hospital is to provide for the care of persons suffering from illness or injuries that require emergency and inpatient care; to carry on any education activities related to rendering care to the sick and injured or the promotion of health which, in the opinion of the Board of Managers, may be justified by the facilities, personnel, funds or other requirements that are or can be made available; to promote and carry on scientific research related to the care of the sick and injured insofar as in the opinion of the Board of Managers such research can be carried on in or connection with the hospital; and to participate, so far as circumstances may warrant, in any activity designed and carried on to promote the general health of the community.

Section 1. Titus County Memorial Hospital is a nonprofit hospital.

A. It shall operate exclusively for nonprofit reasons. No part of its net earnings shall inure to the benefit of any officer, manager or private individual, or shall it ever declare or make to any such person or persons any dividend or other distribution.

B. Nothing herein shall prevent reimbursement of actual and necessary traveling and other expenses incurred in connection with the operations of the hospital.

C. All officers and members of the Board of Managers will be held harmless for the acts while performing their duties as members or officers of the Board of Managers of Titus County Memorial Hospital. The Board may purchase and provide the Managers with liability insurance the Board considers necessary or advisable to protect the Managers from risks that might result from serving on the Board.

ARTICLE III - BOARD OF MANAGERS

Section 1. The Board of Managers shall consist of seven (7) members, who shall be elected by the qualified voters of Titus County, Texas. Managers shall be elected with one Manager elected from the area of each commissioner's precinct in Titus County and three Managers elected from the District At Large. Of the candidates for Manager for a precinct, the one receiving the highest number of votes in the precinct is elected as the Manager for that precinct, and of the candidates for Manager for the District At Large, the three receiving the highest number of votes in the district are Managers for the District At Large.

Section 2. The appropriate number of Managers shall be elected for four-year (4) terms on the first Saturday in May each even-numbered year. The Board of Managers shall order an election of Managers, provide for clerks, give notice of the election, canvass the returns, and declare the results in the manner provided by Section 1 of this Section. A person desiring to have his name

printed on the ballot as a candidate for Manager shall file with the Secretary of the Board, at least thirty-five (35) days before the election of Managers, a petition signed by at least ten (10) qualified voters residing in the district, asking that his name be printed on the ballot as a candidate to represent a specific precinct area or the district at large. A candidate for Manager must be a resident of the district and a candidate for the Manager for a precinct area must be a resident of that precinct.

Section 3. The election of the Board of Managers scheduled before the effective date of HB 1724 to be held in May, 1990, must be held and the Managers elected at that election shall serve a two-year (2) term.

Section 4. The election of the Board of Managers scheduled before the effective date ofHB 1724 to be held in May, 1991, must be held and the Managers elected at that election shall serve until the Managers elected in May, 1994 take office.

Section 5. The Managers elected at the election to be held in May, 1992 and May, 1994 shall serve four-year (4) terms.

Section 6. The Chief of the Medical Staff of the principle hospital in the district shall serve as a non-voting, ex-officio member of the Board of Managers.

Section 7. A vacancy in the Office of Manager, other than an ex-officio member, shall be filled for the unexpired term by the remaining officers of the Board as provided by the laws of this State.

Section 8. Four (4) members of the Board, not including the ex-officio member, shall constitute a quorum, and a concurrence of a majority of the voting members present is required on all matters pertaining to the business of the district.

Section 9. Failure of any member of the Board of Managers to attend three (3) consecutive regular meetings of the Board shall cause a vacancy in the office, unless such absence is excused by formal action of the Board as provided by the laws of this State.

Section 10. The duties of the Board of Managers shall be to manage, control and administer the hospital or hospital system of the hospital district. **The Board of Managers shall have the power and authority to sue and be sued and to promulgate rules and regulations for the operation of the hospital or hospital system.** (emphasis added)

Section 11. The Board of Managers shall have the authority to employ under terms prescribed by the Board such employees of every kind and character as may be deemed advisable for the efficient operation of the hospital or hospital system.

ARTICLE V - OFFICERS & COMMITTEES:

Section 1. From among its' members, the Board shall choose a Chairman who shall preside, or in his absence a Vice-Chairman shall preside, and the Administrator or any member of the Board may be elected Secretary.

Section 2. As soon as practical following the election, the Chairman shall appoint the following committees:

A. Joint Conference Committee - This committee is composed of the Chairman, Vice Chairman, one other member of the Board, the Administrator, Assistant Administrator and the (5) members of

the Medical Staff Executive Committee and up to (5) additional Medical Staff members as appointed by the chairman. The Joint Conference Committee will meet as needed. (Amended February 24, 2003.)

B. Building Committee - This committee is composed of up to three (3) members but no less than (two)2 of the Board, Administrator, and Assistant Administrator. The Building Committee will meet as needed, but at least semi-annually. This committee reviews and makes recommendations to the Board of programs, policies and projects related to building, construction and grounds.

C. Executive Committee - This committee is composed of the Chairman, ViceChairman, one other Board Member, Administrator, and Assistant Administrator. The Executive Committee will meet as needed. This committee reviews any and all matters requiring action between regular and special Board Meetings and acts as an advisory committee which reviews and makes recommendations to the Board of matters related to legal,

personnel, organizational structure and Bylaws.

D. Finance Committee - This committee is composed of three (3) members of the Board, the Administrator, the Assistant Administrator, and the Director of Financial

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Services. The Finance Committee will meet at least annually. This committee reviews and makes recommendations to the Board on all matters related to finance and equipment and to transact the banking business for the Board related to notes, certificates of

deposits, leases, bank accounts, tax funds and bonds. The Chairman of the Board shall be an ex-officio member of all Board Committees.

ARTICLE VI - DUTIES OF OFFICERS

Section 1. The Chairman of the Board shall preside at all meetings of the Board of Managers. He shall in general supervise all the business affairs of the hospital district. He may sign with the Secretary or any other proper officer authorized by the Board of Managers any deeds, bonds, mortgages, contracts or other instruments which the Board of Managers have authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board of Managers, or by these Bylaws, or by statute to some other officer or agent of the district. He shall, in general perform all duties incident to the office of Chairman and such other duties as may be prescribed by the Board of Managers from time to time. Given the fact that the Chairman is elected from the Board of Managers, and has previously been elected to his position on the Board of Managers

by the voters of Titus County, and in accordance with the state law, the Chairman may vote on any and all issues. (AMENDED MAY 6, 1991)

Section 2. In the absence of the Chairman or in the event of his inability or refusal to act, the Vice-Chairman shall perform the duties of the Chairman, and when so acting shall have all the powers of and be subject to all the restrictions upon the Chairman. The Vice-Chairman shall perform such other duties as may be assigned him by the Chairman or by the Board of Managers.

Section 3. The Board shall require the Secretary to keep suitable records of all proceedings of each meeting of the Board. Such records shall be read and signed after each meeting by the Chairman of the member presiding and attested by the Secretary.

The Board shall have a seal on which shall be engraved the name of the hospital district, and said seal shall be kept by the Secretary and used in authentication of all acts of the Board.

ARTICLE XI - ADMINISTRATOR

The Board of Managers shall appoint, under terms prescribed by the Board, a general manager to be known as the Administrator of the hospital district. The Administrator shall receive such compensation as may be fixed by the Board. The Administrator shall be subject to removal at any time by the Board. The Administrator, shall, before entering into the discharge of his duties, execute a bond payable to the district, in the amount of not

less than ten thousand dollars ($10,000), conditioned that he shall well and faithfully perform the duties required of him and containing such other conditions as the Board may require. **The Administrator shall perform all duties which may be required of him by the Board, and shall supervise all of the work and activities of the district and have general direction of the affairs of the district, within such limitations as may be prescribed by the Board.** He shall be a person qualified by training and experience for the position of Administrator. (emphasis added)

As soon as practical after the close of the fiscal year, the Administrator shall report to the Board of Managers, by a full sworn statement, of all monies received and how disbursed or otherwise disposed of He shall make a detailed report of operations of the district for the fiscal year. He shall prepare for the approval of the Board an annual budget and shall perform any and all other duties assigned him by the Board of Managers. **He shall supervise the work of all employees and shall assign to the employees their respective tasks and duties and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal.** (emphasis added)

ARRT Standards of Ethics (emphasis added)
Effective: July 2001

[App 4 B]

PREAMBLE

The *Standards of Ethics* of The American Registry of Radiologic Technologists shall apply solely to persons holding certificates from ARRT who either hold current registrations by ARRT or formerly held registrations by ARRT (collectively, "Registered Technologists"), and to persons applying for examination and certification by ARRT in order to become Registered Technologists ("Applicants"). The Standards of Ethics are intended to be consistent with the Mission Statement of ARRT, and to promote the goals set forth in the Mission Statement.

A. CODE OF ETHICS : The Code of Ethics forms the first part of the Standards of Ethics. The Code of Ethics shall serve as a guide by which Registered Technologists and Applicants may evaluate their professional conduct as it relates to patients, health care consumers, employers, colleagues and other members of the health care team. The Code of Ethics is intended to assist Registered Technologists and Applicants in maintaining a high level of ethical conduct and in providing for the protection, safety and comfort of patients. **The Code of Ethics is aspirational.**

1. The radiologic technologist conducts herself or himself in a professional manner, responds to patient needs and supports colleagues and associates in providing quality patient care.

2. The radiologic technologist acts to advance the principle objective of the profession to provide services to humanity with full respect for the dignity of mankind.

3. The radiologic technologist delivers patient care and service unrestricted by the concerns of personal attributes or the nature of the disease or illness, and without discrimination on the basis of sex, race, creed, religion or socioeconomic status.

4. The radiologic technologist practices technology founded upon theoretical knowledge and concepts, uses equipment and accessories consistent with the purposes for which they were designed, and employs procedures and techniques appropriately.

5. The radiologic technologist assesses situations; exercises care, discretion and judgment; assumes responsibility for professional decisions; and acts in the best interest of the patient.

6. The radiologic technologist acts as an agent through observation and communication to obtain pertinent information for the physician to aid in the diagnosis and treatment of the patient and recognizes that interpretation and diagnosis are outside the scope of practice for the profession.

7. The radiologic technologist uses equipment and accessories, employs techniques and procedures, performs services in accordance with an accepted standard of practice, and demonstrates expertise in minimizing radiation exposure to the patient, self and other members of the health care team.

8. The radiologic technologist practices ethical conduct appropriate to the profession and protects the patient's right to quality radiologic technology care.

9. The radiologic technologist respects confidences entrusted in the course of professional practice, respects the patient's right to privacy and reveals confidential information only as required by law or to protect the welfare of the individual or the community.

10. The radiologic technologist continually strives to improve knowledge and skills by participating in continuing education and professional activities, sharing knowledge with colleagues and investigating new aspects of professional practice.

APPENDIX 5

TITUS REGIONAL MEDICAL CENTER
TITUS COUNTY MEMORIAL HOSPITAL
2001 N. Jefferson Mt. Pleasant, Texas 75455 903-577-6000
TITUS COUNTY EMERGENCY MEDICAL SERVICE
NORTHEAST TEXAS RURAL HEALTH CLINIC
TITUS REHABILITATION CENTER
CENTER FOR WOMEN'S HEALTH
COMMUNITY PRENATAL CLINIC
SKILLED NURSING FACILITY

[App 5 A]

TO: Joan Roberts
FROM: Gene Lott, V. P.
Human Resources
DATE: June 14,2002

On April 10, 2002, you received two different written final warnings. The subject areas covered in that counseling were solicitation of employees, on call responsibility and diagnosing patients' problems and giving them medical advice.

Since that meeting on April 10, 2002, you have violated the terms of that counseling session. Our information reflects that not only did you violate these terms, you violated them several times in the areas of soliciting employees and diagnosing patients' problems and giving medical advice.

As a result of these willful violations we are terminating your employment with TRMC effective immediately.

_____ 6/14/02
Employee Date
E. E. Lott
Vice President of Human Resources
George Burns
Witness

TITUS COUNTY HOSPITAL DISTRICT

[App 5 B]

CHAPTER 298 [55]

H. B. No. 786

An Act authorizing the creation of a Hospital District comprising all of Titus County, Texas, and the assumption of all outstanding indebtedness of Titus County incurred for hospital purposes; providing said District shall assume responsibility for medical and hospital care for the needy residing within the District; providing that such District shall not be created until authorized by a majority vote of the qualified property taxpaying electors in said District at an election called by the Commissioners Court on its own motion or upon petition; prescribing the form of the ballot for said election; authorizing the levy of a tax by said District not exceeding seventy-five cents (75¢) on the One Hundred Dollar valuation of taxable property for the purpose of maintaining and operating a hospital or hospitals and making additions and improvements thereto; providing the method of assessing and collecting taxes; authorizing the issuance of bonds by the District and prescribing the procedure therefor; authorizing the issuance of refunding bonds by the District; authorizing the conveyance of all hospital properties by Titus County to the Hospital District; **providing for the appointment of a Board of Hospital Managers for said District and prescribing its powers and duties;** authorizing the establishment of a retirement system for employees of the District; granting the power of eminent domain to the District; providing for the selection of a depository for funds of the District; **prescribing duties of officers of the District** and other officers of the County and State **with respect to the District;** prohibiting the levy of any tax by Titus County or any city therein, for hospital purposes after the creation of the District; making bonds of the District eligible for investment of certain funds and (emphasis added)

as security for certain deposits; making a finding that local notice has been properly given; providing a saving clause; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. In accordance with the provisions of Article IX, Section 9, Constitution of the State of Texas, this Act shall be operative so as to authorize the creation, establishment, maintenance and operation of a Hospital District within the State of Texas, to be known as Titus County Hospital District, and the boundaries of said District shall be coextensive with the boundaries of Titus County (hereinafter referred to as the "County"), and said District shall have the powers and responsibilities provided by the aforesaid Constitutional provision.

Sec. 2. That said District hereby provided for shall assume full responsibility for providing medical and hospital care for the needy residing within the District; provided, however, that such Hospital District shall not be created unless and until an election is duly held in said County for such purpose, which said election may be initiated by the Commissioners Court upon its own motion or upon a petition of fifty (50) resident qualified property taxpaying voters, to be held not less than thirty (30) days from the time said election is ordered by the Commissioners Court. At such election there shall be submitted to the qualified property taxpaying voters the proposition of whether or not a Hospital District shall be created in the County; and a majority of the qualified property taxpaying electors participating in said election voting in favor of the proposition shall be necessary. The ballots for said election shall have printed thereon:

"FOR the creation of a Hospital District; providing for the levy of a tax not to exceed seventy-five cents (75¢) on the One Hundred Dollar val

[55] Vernon's Ann. Civ. St. art. 4494-q – 17.

TITUS REGIONAL MEDICAL CENTER EMPLOYEE
COUNSELING RECORD - PAGE 1

DATE 3-4-02

EMPLOYEE NAME *Joan Roberts*
TITLE *C.T. TECHNOLOGISTS*
DEPARTMENT *RADIOLOGY*
SHIFT 1

[App 5 C]

INSTRUCTIONS:

1. MAY BE TYPED OR HANDWRITTEN (PRINT CLEARLY).
2. SECTIONS SHOULD BE COMPIETED IN NUMERICAL ORDER.
3. PROVIDE & COMPLETE FACTS OF PROBLEM, VIOLATION OR DEFICIENCY.
4. SIGN FORM IN SPACE PROVIDED.
5. REQUEST EMPLOYEE TO MAKE ANY COMMENTS DESIRED AND SIGN IN SPACE PROVIDED FOR EMPLOYEE (SECTION IV). IF THE EMPLOYEE REQUIRES ADDITIONAL SPACE USE ADDITIONAL SECOND SHEETS (SECTION V) AND MAKE APPROPRIATE ENTRIES IN PAGE NUMBER AREA.
6. AFTER COMPLETION PROVIDE EMPLOYEE WITH DUPUCATE COPY.
7. IF MULTIPLE SHEETS ARE USED, BOTH THE SUPERVISOR'S AND EMPLOYEE'S SIGNATURE MUST APPEAR ON EACH SHEET.

SUPERVISOR/DEPARTMENT HEAD STATEMENT OF PROBLEM, VIOLATION, OR DEFICIENCY:

Interpreting (or giving your opinion) of C.T. scans to physicians is our of your "scope" of practice – this is not the first time you have been told about this. If ask what you found you are to direct them to the radiologist. See attached ARRT standards of ethics.

Feb 28

This happened twice on ~~yesterday~~. Also a patient reported that you advised her not to follow her physicians advice. Discussing and/or advising a pt.

TYPE OF ACTION: [ ] WRITTEN WARNING [ ] SUSPENSION
[/] VERBAL WARNING [ ] PROBATION [ ] TERMINATION

George Burns R. T. (R) GEORGE BURNS DIRECTOR
SUPERVISOR/DEPT. HEAD SIGNATURE RADIOLOGY
NAME AND TITLE
(PRINT OR TYPE)

EMPLOYEE STATEMENTS/COMMENTS:
The above stated allegations are improper in that they are general and vague complaints which fail to specify the specific acts of conduct, statements, ect. that are complained of and would allegedly (continued next page)

A COPY OF THIS COUNSELING RECORD
HAS BEEN RECEIVED
AND CONSISTS OF A TOTAL
OF____ PAGES.

Joan Roberts R.T.
SIGNATURE OF EMPLOYEE

ORIGINAL: TO PERSONNEL ASSISTANT COPY: TO EMPLOYEE

TITUS REGIONAL MEDICAL CENTER EMPLOYEE
COUNSELING RECORD - PAGE 1

DATE 3-4-02

[App 5 C]

EMPLOYEE NAME *Joan Roberts*
TITLE *C.T. TECHNOLOGISTS*
DEPARTMENT *RADIOLOGY*
SHIFT *1*

INSTRUCTIONS:

1. MAY BE TYPED OR HANDWRITTEN (PRINT CLEARLY).
2. SECTIONS SHOULD BE COMPIETED IN NUMERICAL ORDER.
3. PROVIDE & COMPLETE FACTS OF PROBLEM, VIOLATION OR DEFICIENCY.
4. SIGN FORM IN SPACE PROVIDED.
5. REQUEST EMPLOYEE TO MAKE ANY COMMENTS DESIRED AND SIGN IN SPACE PROVIDED FOR EMPLOYEE (SECTION IV). IF THE EMPLOYEE REQUIRES ADDITIONAL SPACE USE ADDITIONAL SECOND SHEETS (SECTION V) AND MAKE APPROPRIATE ENTRIES IN PAGE NUMBER AREA.
6. AFTER COMPLETION PROVIDE EMPLOYEE WITH DUPUCATE COPY.
7. IF MULTIPLE SHEETS ARE USED, BOTH THE SUPERVISOR'S AND EMPLOYEE'S SIGNATURE MUST APPEAR ON EACH SHEET.

SUPERVISOR/DEPARTMENT HEAD STATEMENT OF PROBLEM, VIOLATION, OR DEFICIENCY:

regarding treatment is clearly our of your scope of practice. If you continue to advise physicians & patients regarding outcomes or treatment you may be terminated.

TYPE OF ACTION: [/] WRITTEN WARNING [ ] SUSPENSION
[ ] VERBAL WARNING [ ] PROBATION [ ] TERMINATION

George Burns GEORGE BURNS DIRECTOR

SUPERVISOR/DEPT. HEAD SIGNATURE NAME AND TITLE (PRINT OR TYPE)

EMPLOYEE STATEMENTS/COMMENTS:

(continued from page one)

support this claim, therefore in its entirety I cannot respond.

A COPY OF THIS COUNSELING RECORD HAS BEEN RECEIVED AND CONSISTS OF A TOTAL OF 3 PAGES.

Joan Roberts R.T.

SIGNATURE OF EMPLOYEE

ORIGINAL: TO PERSONNEL ASSISTANT COPY: TO EMPLOYEE

stations. I went to Dr. Aydelott to explain the situation and explained to him we could still scan using a different setting. He wanted me to cancel the patients. I explained what we had on the schedule and I felt we could work around the problem because some of the patients had already drank their prep. He still wanted me to cancel the patients. Darrell arrived as I was canceling the patients and I informed him of the situation. He went and talked to Dr. Aydelott and then came back and said Dr. Aydelott does not want the patients cancelled.

80. Attached to this counsel in March, was an attached copy of the ARRT Code of Ethics with ARRT #6 highlighted.

81. Mr. Burns made no oral explanations. The statements in the counsel were vague and ambiguous and conclusory, to me. I responded in writing because whenever I spoke I was always regarded in some negative manner as evidenced by the grievance response letters. I asked for specifics and was never given any.

82. On 3-6-02, Darrell was sitting at the scanner and I was next to him. The phone rang and I answered it. It was Dr. Aydelott and he ask me if Darrell was there and I said yes. He ask if he could speak to Darrell. I said sure and I gave the phone to Darrell. Darrell said "Ok" on the phone and then gave it to me to hang up. Darrell then said to me, "Dr. Aydelott wants to see you." I went into his office and Dr. Aydelott said to me "Don't put the x-ray jackets on that stool, put them on my desk." The stool butted up next to the desk and is was

[App 5 D]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[App 5 E]

JOAN CAROL ELLIS ROBERTS	§	
Plaintiff,	§	CIVIL ACTION
vs.	§	NO. 5:03 CV 21
	§	
1. TITUS COUNTY MEMORIAL	§	JUDGE FOLSOM
HOSPITAL OF THE TITUS COUNTY	§	
HOSPITAL DISTRICT;	§	
2. GEORGE BURNS,	§	
DIRECTOR OF RADIOLOGY;	§	
3. GENE LOTT, DIRECTOR	§	
OF HUMAN RESOURCES	§	
Defendants.	§	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, Titus County Memorial Hospital ("Titus"), George Burns, and Gene Lott, moving for Summary Judgment under F.R.C.P. 56 and would show the Court as follows:

I.

The Plaintiff was employed with Defendant, Titus County Memorial Hospital, in Mt. Pleasant, Texas from April, 1986 until her employment was terminated on June 14,2002 due to Plaintiff's refusal to abide by the policies of her employer despite warnings given to Plaintiff on several occasions.

II.

Plaintiff alleges deprivation of the Plaintiff's rights of free speech under the First and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. § 1983 by (1) Defendant's implementation of a departmental policy entitled ARR T #6 which prohibited Plaintiff

from diagnosing and giving medical advice; (2) Defendant's policy regarding solicitation which prohibited the Plaintiff from soliciting employees while she or the employees were on the job; and (3) a final letter of warning to discontinue the actions of diagnosing patients and solicitation.

III.

Plaintiff claims she had a constitutional right to diagnose and give medical advice. Plaintiff also claims she had the constitutional right to solicit information from employees while on duty to help her in a lawsuit filed under the Texas Whistleblower laws. Plaintiff had a lawsuit pending in the District Court in and for Titus County, 76/276th Judicial District, Cause No. 29675 for alleged violations of the Texas Whistleblower Act on which the Court recently granted Defendant summary judgment. All allegations of Plaintiff relating to these alleged violations have been addressed in that lawsuit.

IV.

Plaintiff further alleges that she was deprived of her Due Process rights under the First and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. § 1983 by the exercise of "the established policies and customs" of the ARRT #6 policy relating to the standard of conduct of radiologic technologists and the Defendant's policy against solicitation while at work.

V.

Plaintiff also alleges she was intentionally discriminated against because of her sex in violation of Title VII, creating an abusive hostile work environment for (1) exercising her rights to free speech, and (2) filing an EEOC charge of sex discrimination. Plaintiff claims an abusive hostile work environment was created by: (1) George Burns' association with Dr. Davis, Dr. Aydlelott, Adam Larson, Gene Lott, Steve Jacobson, Darrell Beck and Francis Standridge; (2) reprimanding

Plaintiff in March and April; (3) unfavorable performance reviews; (4) creation of a new position of Lead CAT Scan Tech and awarding the position to Darrell Beck; (5) unequal treatment of Plaintiff by treating Plaintiff's male co-worker with different "communicative efforts" and giving the male co-worker "privileges and professional courtesies not afforded plaintiff;"; (6) Defendant's policy addresses only sexual harassment and not nonsexual discrimination motivated by gender bias; (7) Defendant's EEOC policy refers to employees, not employers; and (8) George Burns' violation of Title VII by creating a discriminatory abusive work environment in treating male co-workers differently than Plaintiff.

VI.

Plaintiff additionally alleges she was retaliated against in violation of Title VII for making an EEOC charge of sex discrimination on December 18, 2001.

VII.

This motion is supported by a brief; deposition excerpts of Plaintiff; deposition excerpts of Edward Eugene Lott; Deposition excerpts of George Burns; letter of termination; copy of EEOC charge; ARRT Policy; memo regarding solicitation of employees; April 9, 2002 letter to Plaintiff regarding recent problems; Grievance Response from Frances Standridge; Letter to George Burns from Dr. Aydelott and Dr. Davis dated September 20, 2001; memo to technologists from George Burns dated September 21, 2001; letter from Dr. Davis to Burns dated April 9, 2001; memo from Jacobson to Roberts dated January 8, 2002; Plaintiff's Performance Evaluation dated November 23, 2002; Plaintiff's Performance Evaluation dated March 13, 2001; Comprehensive Treatment Plan of Plaintiff dated September 8, 1992 and notes dated September 22, 1992; Employee Counseling Record dated 6/7/01; and Employee Counseling Record dated 3/4/02.

VIII.

Pursuant to **Rule 56 of the Federal Rules of Civil Procedure**, there are no genuine issues as to any material fact as to the claims asserted by the Plaintiff. Plaintiff's claim of violation of her right to free speech must fail as Plaintiff's "speech" was a matter of personal opinion and benefit, not a matter of public concern. Plaintiff also failed to identify specific "speech" which she believes was protected. Furthermore, any interest Plaintiff may have had in diagnosing patients and soliciting employees is far outweighed by the hospital's interest in protecting its patients from someone not authorized to make medical diagnoses and in promoting hospital efficiency.

Plaintiff's claim of violation of her due process rights resulting in the deprivation of her constitutionally protected property interest in continued employed must fail. Plaintiff did not have an employment contract or agreement of any kind with Titus. Texas courts have made it very clear that in order for an employee to have a protected property interest, there must be an agreement between the parties. Plaintiff did not have a protected interest, and, therefore, no process was due. Furthermore, Plaintiff's failure to prove a U.S. Constitutional Amendment I claim is fatal to a substantive due process claim.

Plaintiff's claim of violation of Title VII by alleged discrimination against because of her sex must also fail as Plaintiff has not stated any specific facts showing a genuine issue or that Plaintiff was treated differently than male employees in similar circumstances. Plaintiff's claim of sex discrimination relating to a promotion fails for several reasons. First, Plaintiff has not shown there was any new position created. Second, Plaintiff has not shown that she was discriminated against

because of her sex rather than decisions made based upon her qualifications and ability to work with others.

Lastly, Plaintiff's claim of retaliation for exercising her right of free speech must fail as the Plaintiff has not shown her speech qualified for protection in that it was a matter of private concern rather than public concern, and the disruptive nature of Plaintiff's speech outweighed any interest she may have had in making such speech. Additionally, Plaintiff's claim of retaliation for filing an EEOC claim fails as she has not shown that she would not have been terminated "but for" her filing the EEOC claim. Plaintiff was terminated for refusing to follow her employer's instructions to refrain from diagnosing patients, giving medical advice, and soliciting employees for her lawsuit while on duty despite repeated warnings to do so. Insubordination is a legitimate, non discriminatory reason for termination.

Plaintiff has failed to prove all the elements necessary for her claims.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Court grant their Motion for Summary Judgment and further grant any and all other relief to which they may be justly entitled whether at law or in equity.

Respectfully submitted,

Louise Tausch

Louise Tausch, *Attorney-in-Charge*
Texas State Bar No. 19680600
Arkansas Bar No. 86212
E-mail: ltausch@arwhlaw.com

Jeffery C. Lewis
Texas State Bar No. 12280950
Arkansas Bar No. 91098
E-mail: jlewis@arwhlaw.com

[APP 5 F]

REQUEST 7:
Produce all documents that show plaintiff did not timely file a charge of discrimination with the Equal Employment Opportunity Commission.

RESPONSE:
Defendants object on the grounds that this seeks to require the responding parties to marshall all of their available proof or the proof the parties intend to offer at trial. Defendants object to the extent this invades the attorney client privilege; the attorney work product privilege; and the investigative privilege. Without waiving said objections, Defendants have previously produced numerous documents to the Plaintiff including her personnel file, counselings, and correspondence, regarding this claim and Plaintiff s other claims. Also, the depositions of George Bums and Gene Lott have been taken and Plaintiff has access to the same. Finally, Defendants would refer Plaintiff to their Initial Disclosures and all supplemental disclosures.

REQUEST 8:
Produce all documents that show the form and content of the speech that is the basis of this lawsuit.

RESPONSE:
Defendants object on the grounds that Plaintiff is requesting Defendants to prove her lawsuit. This request is overly broad, general, vague, and confusing. Defendants object to the extent this invades the attorney client privilege; the attorney work product privilege; and the investigative privilege. In addition, Plaintiff has not identified "the speech" to which she refers herein such that Defendants cannot respond appropriately without further clarification. Finally, Defendants object on the grounds that this seeks to require the responding parties to marshall all of their available proof or the proof the parties intend to offer at trial. (emphasis added)

REQUEST 9:
Produce all documents that describe the actions, conduct, or measures taken by defendants in response to plaintiff's speech.

RESPONSE:
Defendants object on the grounds that this is overly broad, general, and vague. If plaintiff will identify the speech she claims to be in issue, then Defendants may be able to respond. Defendants object on the

prohibit her from talking with them, but just during–

THE COURT: It was simply during on-the-job hours?

MS. TAUSCH: Correct. Just during the time that we were paying them to work for the Hospital and paying her to word for the Hospital. She received two warning letters describing these activities and stating that they were against policy and that she needed to stop, and she did not ant that's why she was terminated.

She claims that she had the constitutional right to diagnose and give medical advice because it was in the patient's best interes; however, according to the policy and the laws of Texas, you can't practice medicine without a licnese, Your Honor, and that's what we perceived she was doing.

She also has a claim for sexual discrimination and a hostile work environment for two things. Number one, NUMBER ONE, exercising this freedom of speech, or so she claims, as well as filing three EEOC charges of discrimination against the Hospital. However, two of those charges occurred after she was terminated, so those cannot contribute to a hostile work environment claim. The first one was dismissed by the EEOC, and I will talk about that in just a moment.

She also claims retaliation for filing the First EEOC charge, which was dated December 18th, 2001. She was fired on June 14th, 2002, more that six months later, or almost six

[App 5 G]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[App 5 H]

Joan Carol Ellis Roberts	§	CIVIL ACTION
PLAINTIFF	§	NO. 5:03cv21
VS.	§	JURY
1. Titus County Memorial Hospital	§	
of The Titus County Hospital District	§	
	§	U.S. DISTRICT JUDGE
2. George Burns, Individually &	§	DAVID FOLSOM
as Director of Radiology;	§	
	§	
3. Gene Lott, Individually &	§	
as Director of Huuan Resources	§	
DEFENDANTS	§	

AFFIDAVIT OF JOAN CAROL ELLIS ROBERTS

STATE OF TEXAS §
COUNTY OF TITUS §

Before me, the undersigned notary, on this day personally appeared Joan Carol Ellis Roberts, a person whose identity is known to me. After I administered an oath to her, upon her oath she said:

1. "My name is Joan Carol Ellis Roberts, I am over eighteen (18) years of age, of sound mind and capable of making this Affidavit. I have personal knowledge of the facts stated in this affidavit, and they are true and correct.

2. I am a citizen of the United States of America and live at 107 Fortner Lane, Mt. Pleasant, Texas.

3. I was an employee of Titus County Menorial Hospital from

April of 1986 to June 14th, 2002. I worked full time in the Radiology Department as a Cat Scan Technologist.

4. I was terminated on June 14, 2002 by Gene Lott, the Director of Human Resources with George Burns present as a witness.

5. I have never believed or stated that it was in my scope of practice to make diagnoses.

6. I have never practiced medicine.

7. I did not solicit as alleged in the letter of termination.

8. I filed a Whistleblower lawsuit on February 7, 2002 in Titus County against Titus County Memorial Hospital.

9. The hospital put a notice in the Mt. Pleasant Daily Tribune newspaper on Wednesday March 14, 2001 for bids on a CAT scan machine. Attached to this affidavit is a true and correct copy of that newspaper notice.

10. I made a report in good faith to two hospital board members, Bruce King and Rick Strudthoff.

11. I reported what I believed to be violations of the competitive bidding laws based the irregular events in the purchase of a CAT scan machine that I had witnessed.

12. Darrell Beck, the other CAT scan tech. told me the purchase order for the CAT scan machine had to be issued by friday May 4, 2001.

13. I made these reports by telephone from my home phone on Thursday night May 3, 2001, the night before the deadline.

14. My husband is witness to the phone calls and he voiced strong disapproval to me about getting involved.

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defendant in discovery.

52. I did not give the hospital any cause to terminate me.

53. I do not personally know of any investigation relating to the facts of my termination. I was not ever asked any information relating to any of the charges.

54. The letter of termination I received is attached to this affidavit and is a true and correct copy. I was called into George Burns office and handed the letter to read by Gene Lott.

55. Mr. Lott had two copies of the letter ready for me to sign.

56. The termination letter only gave conclusory statements and no specifics were stated orally.

57. Mr. Lott stated "I need you to sign it." I stated, "No I don't want to sign it." I then left.

58. The hospital has no post termination grievance or hearing process.

59. I sent a letter to Mr. Jacobson and asked for specific details relating to the charges. Attached to this affidavit is a true and correct copy of the letter I mailed to him dated 9-12-2002.

60. Mr. Jacobson sent me a reply and declined to give be any

specifics. Attached to this affidavit is a true and correct copy of that letter date Oct. 3, 2002.

61. I was never told orally or in writing that my speech was disruptive.

62. I was the only primary CT tech for many years at Titus county Memorial Hospital. In october of 1998 a 2nd CT tech Darrell

---

MS. TAUSCH: I don't know if she is a member of that organization, Your Honor, but however, we adopted that policy as a policy for the Hospital technicians.

THE COURT: Is there a cause of action under her complaint that alleges that is in some fashion constitutionally or unconstitutionally vague? Have you moved for summary judgment on that cause of action?

MS. TAUSCH: We have included that in out motion, Your Honor, to state that this is not the proper course to challenge that, that national policy. What she has claimed is that it deprived her of freedom of speech, that's how she has asserted it. And therefore, we have stated that the policy does not deprive her of freedom of speech simply because --

THE COURT: So you have moved for summary judgment on all causes of action?

MS. TAUSCH: Correct, Your Honor. She also complains about Titus' policy against solicitation. She claims that it prohibited her from soliciting employees while they were working or while she was working, and that's true, it does. What occurred is Ms. Roberts filed the lawsuit, two lawsuits against the Hospital and two physicians in State Court. Under the discovery rules she ha to provide some information to us, so while she was working and/or while the other employees were working, she solicited information from them, talked to them about her lawsuit, and went forward with that. We did not

[App 5 I]

Plaintiff in this case was soliciting employees at the hospital during working hours, disrupting the operation of the hospital, and causing complaints from other employees regarding her solicitation.[15] Plaintiff continued this action, despite the fact that she had been warned against this type of behavior.[16]

Plaintiff claims that hospital policy which restrained her solicitation of employees and hospital policy which prohibited her making medical diagnoses and giving medical advice to patients restrained her free speech.[17] However, when an employee's speech concerning office policy arises from an employment dispute concerning the very application ofthat policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office. *Connick, Id.* Just as the court held in *Connick* that the limited First Amendment interest involved did not require the employer to tolerate action which they reasonably believed would disrupt the office, undermine authority, and destroy close working relationships and no First Amendment rights were violated, so also in this case Defendant was not required to tolerate such behavior from Plaintiff and Plaintiffs First Amendment rights were not violated.

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15 Exhibit 2: Deposition excerpts of Lott (pg. 15, lines 4-9; pg. 17, lines 1-4 and lines 10-25; pg. 18, line 1)

16 Exhibit 2: Deposition excerpts of Lott (pg. 19, lines 6-9)

17 See Plaintiff's Third Amended Petition

[App 5]]

and rotate accordingly, and problems with diagnosing patients. And I believe there's also -- yeah.

Q. Okay.

A. And then the second part of it was soliciting employees while they're on duty while either she was on duty or the employees were on duty, which is unacceptable. And then a final warning was given on both -- on all these violations.

Q. Okay. Both of these warnings or memos to -- were to Ms. Roberts dated April 9, 2002; is that correct?

A. Yes, ma'am.

Q. And they came from you -

A. Yes, ma'am.

Q. -- correct?

A. Yes, ma'am.

Q. The first one is entitled recent problems; is that right? It says, concerning recent problems?

A. I'm looking here.

Q. Okay.

A. Yes.

Q. Okay. And it -- was there a problem in regard to being on call for the CT techs?

A. Yes. And the problem, from my

[App 5]]

That Ms. Roberts was soliciting employees to get their addresses and names, and the indication was going to subpoena them as witnesses --

Q. Okay.

A. -- in the case.

Q. So Ms. Roberts had already filed a lawsuit the hospital but was still working there?

A. Yes.

Q. And during the time that she was at work supposed to be working for the hospital, she was engaged in -- in discussing something along those lines with other employees?

A. Yes, ma'am.

Q. And were the other employees at work, too?

A. Yes.

Q. Okay. So in regard to your memo to her, was it a matter of telling her not to do that while she's on duty or the employees are on duty?

A. That is correct.

Q. And as director of human resources, is that -- is that a reasonable thing to ask of your employees, and that is that they -- that they work when they're on the clock?

A. Yes. And we do have a no-solicitation

[App 5]

policy in our handbook additionally.
Q. And let me show you that. I don't have a copy of it. But I have a copy of your handbook here, and I'll turn to Page 12. At the top, I believe there are a list of serious offenses for which employees can be disciplined; is that right?
A. Yes, ma'am.
Q. And solicitation is included on that?
A. Yes, ma'am.
Q. In regard to a serious offense, can that bring about immediate dismissal?
A. If the nature of it was severe enough, yes.
Q. Okay.
A. But in most cases, we would give the individual a warning. We could do a suspension and a ninety-day suspension or probation or just a flat-out warning - -
Q. Okay.
A. – that this must cease. And that's - that's why the final warning was attached to those things.
Q. So in this particular case, you didn't fire Ms. Roberts, but you gave her warnings?
A. Yes.

[App 5]

Q. Okay. What was Ms. Roberts' reaction when you talked with her about these two memos?
A. Somewhat unbelieving, I guess would be a good word. She didn't think she had done any of that.
Q. All right. Now, as to your knowledge, did Ms. Roberts continue in the activities that you had warned her not to do?
A. Yes, ma'am.
Q. All right. And there was a termination letter issued to Ms. Roberts; is that correct?
A. Yes, ma'am.
Q. And did you author that termination letter?
A. Yes, ma'am.
Q. Okay. And what's the date on that termination letter?
A. June 14 of 2002.
Q. In your opinion as director of human resources, had the hospital made every effort to bring Ms. Roberts' conduct into line with acceptable work performance?
A. Yes, ma'am. I think we went every step we could take.
Q. And as far as your opinion, what was the

[App 5]]

46. Plaintiff objects to defendants attempt to use the April 9, 2002 letter titled solicitation of employees, as probative proof that plaintiff's speech was disruptive. It is not

Plaintiff's 2nd Summary Judgment Response, Page 20.

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probative of such, because it is a conclusory letter that does not state what specific speech that was found to be in violation of the solicitation policy; and how such speech interfered with the efficient function of the duties of the alleged employees.

47. Defendant cites Mr. Lott's deposition (pg. 19, lines 6-9, 19-25; pg. 20, lines 1-3) as probative proof plaintiff continued in activities that were non-specific and plaintiff objects. Plaintiff also objects to Mr. Lott's statement as being proof that he had knowledge plaintiff continued in these nonspecific activities, when he does not state what that knowledge was. Plaintiff also objects to his statement that "I think we went every step we could take" when he failed to list what steps he is referring to, or what specifically the steps were in regard to or if plaintiff had knowledge of any alleged steps.

48. Defendant cites Mr. Lott's deposition (Pg. 15, lines 4-9, Pg. 17, lines 1-4, 10-25, pg.18 line 1) as probative proof that plaintiff was soliciting when reasonable minds may differ as to whether plaintiff's actions could be termed as solicitation; plaintiff contends is it not probative proof and therefore objects. Plaintiff also objects to Mr. Lott's assumptions as not being probative as to plaintiff's motive, but contends his statement is probative of his motive. Plaintiff objects that Mr. Lott's deposition is not probative proof that plaintiff's speech was disruptive. It is not probative of such, because it does not state how such speech interfered with the efficient function of the duties of the

[App 5 K] Plaintiff's 2nd Summary Judgment Response, Page 21.

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alleged employees. Record on Appeal 1498,1499,1500

TITUS COUNTY HOSPITAL DISTRICT
GRIEVANCE PROCEDURE FORM [App 5 L]

EMPLOYEE NAME: Joan Roberts DATE: 10-12-01
TITLE: CT Tech DEPARTMENT: Radiology
PLEASE PRESENT A BRIEF SUMMARY OF THE PROBLEM.
DATE OF OCCURRENCE: September 21, 2001

September 21, 2001, I became aware, for the first time, of a new position for a lead CT technologist. The proper procedure for filling this new position should have been to post the position on the employee bulletin board first so other employees, who might wish to advance, may have the opportunity to do so. Second, it must be advertised publicly. This procedure was never adhered to even though it is hospital policy. Therefore, I was denied the opportunity to even apply. George Bums notified me in writing, on 9-21-01, about the decision of Dr. Aydelott, Dr. Davis and himself to promote Darrell Beck to the position of lead CT technologist. In the letter, they stated that Darrel was the most qualified. I feel Darrel is the least qualifled for this position based on his work performance. I have worked for this institution for 15 years and, out of respect for my work performance, I should have been given the opportunity to apply for this new position. I believe I have been discriminated against by all parties involved because of the sequence of events that took place over the purchase of new CT machines purchased in May 2001. Because I am a taxpayer in this community, I feel it is my right to talk to board members about the waste of hospital money.

I believe these actions, of the above mentioned parties, are a statement of prejudice against me.

Joan Roberts R.T.
Joan Roberts, R.T.

MEMORANDUM

[APP 5 M]

Date: September 21, 2000

To: Joan Roberts R. T. ®
Darrell Beck R. T. ® (CT)
Keith Moffett R.T. ® (CT)

From: George Burns R.T. ®, Director, Radiology Services *GB D GA*

RE: Changes In C. T.

The radiologists and I met yesterday to determine what new direction we wanted to take in C. T.. It was determined that we want to re-organize and have a lead technologist to "head up" the day to day operation. Patient throughput and staying on schedule are to be the top priority. Every effort is to be made to accommodate a patient desiring service in an expedient manner.

It is felt that Darrell Beck is the person most qualified and has the necessary skills to ensure that this is accomplished in an expedient, professional and friendly manner. Effective today he has been designated as "lead technologist" for C. T. Services.

Also the decision was made that oral contrast should whenever possible be Crystal Light with Gastro View. Scan C will still be kept at the front desk and be available when needed. CT personnel will mix the Crystal Light daily and the containers of Contrast should be kept both in CT and at the front desk to save time for the CT technologists. Remember each container should be labeled with the date mixed and the technologists initial.

Call schedule has been changed to allow for all three technologists to have some call time on each paycheck and also to reduce the stress of week-long call schedules.

GB:gb

Memorandum

[App 5 N]

Date: 12/10/2001
To: CT Technologists
Cc: George Burns,
From: Darrell Beck, RT, (R) (CT)
RE: Change in CT LOG

At this time we are only documenting the start time on all CT examinations, effective immediately we will be documenting the exam end time as well. It is very important that the CT log is completed thoroughly and correctly failure to do so will lead to disciplinary actions. I have attached the CT log memo for reference. If you have any questions please contad me.

Please Read and Initial

Joan Roberts

Keith Moffet

DDB
12/10/2001

Please read
then Initial
KM
IR

Memorandum

[App 5 NJ]

Date: 10/412001
To: CT Technologists
Cc: George Burns,
From: Darrell Beck
RE: Early Technologist Duties

Listed are the duties for the early CT Technologist to complete each morning.

1. Check the crash, make sure the defibrillator is fired and check off sheet is completed.

2. Perform a CHECKUP on the CT Scanner, for tube warm-up and calibration.

3. Perform a Quality Check daily with the phantom. NO EXCUSES, this may change once the scanner is inspected and it is not deemed necessary to be done daily. Until then perform daily.

4. Pick up outpatient folders from the CT slot located in the black cart by the file room.

5. Ensure the front desk has enough oral contrast in the pitcher. If not then mix up 2 packets of Crystal Light and 1 bottle Gastro View to 1 gallon of water, then place a label with the date, time made and your initials on it.
6. Send oral contrast up to the floors for inpatients.

DDB
10/4/2001

TITUS COUNTY HOSPITAL DISTRICT
GRIEVANCE PROCEDURE FORM [App 50]

EMPLOYEE NAME: Joan Roberts DATE: 8-28-00
TITLE: CT Tech DEPARTMENT: X-Ray
I have been sexually discriminated against.
PLEASE PRESENT A BRIEF SUMMARY OF THE PROBLEM.
DATE OF OCCURRENCE: Numerous (see following)
sequence of events

1-1-00
New call back pay system went into effect.
When I asked Geroge Burns who decided and
why, he said a committee decided and I asked
him was he on the committee and he said yes.
I ask him did he stand up in our behalf at all
& he simply said, "I told them it wasn't going
to go over very well." End of conversation.
1-4-00 I requested a meeting with Steve Jacobson
& he said he would look into it, the call pay. I had
another meeting with Steve in the X-Ray back door
for about an hour the next month & the last time
I spoke with him was 5-25, of which he said he
hadn't focused on it yet.
June 26 I met David Neely about the issue
since it was apparent, this was 6 months going
and no discussion whatsoever unless I initiated
it.
7-10-00 I asked Darrell to go on a letter requesting
to be removed from call, he agreed. The next day
7-11, Adam & George have a meeting with Darrell.
7-12 Dr. Davis & Dr. Aydelott have a meeting with Darrell.
7-13 George called Darrell to meet with him in Administration

to discuss the call issue with Steve & Francis. I went to Steve & Francis was standing there and I asked "why was I not invited to the meeting, since this effects me just as much as it does Darrell" (over)

Joan Roberts R.T.
SIGNATURE OF EMPLOYEE

My question was never answered. I was only told nothing has been decide yet. That we would all have a meeting next Thursday. We never had the meeting & I was never told anything from George.

7-24 Still no word of any kind, so I requested a family leave from call on Fri Sat & Sun, so I could seek a second job to make up for pay cut because my son was assaulted & my car stolen & I had to borrow my Dad's car to take call.

7-26 George told me there was no such thing of leave of absence from call, it would be discrimination against Darrell. I told him if anybody was discriminated against it was me. He then asked to see my call time & asked me to explain.

8-11 Dr. Davis had meeting with Darrell about call.

8-15 I took my call information to show George like he asked & then he called Darrell in to meet with him & verify my statements.

8-21 I talked with Bruce King.

9-24 George talked with Darrell about call again.

8-25 Francis stopped me in the hall & said they were looking into call pay. I told her since they have drug this on 8 months I wanted retroactive pay. I worked it. She didn't know. Why should I pay for their inability to Focus? Then George called Darrell in to meet with him & Francis in the office & they tell him that they they will make the pay retro for last couple pay checks, after he said he wanted back pay.

Joan Roberts Grievance Response

[App 5 P]

From: Frances Standridge

A decision was made by Radiology Management that with the addition of the new CT machine, there was the need for one of the three existing CT Technologists, while remaining in his/her current position, to be assigned some additional duties, such as coordination of scheduling, emergency procedures, communications, and interpersonal relationships, so that the department would run as smoothly as possible, and to designate that person "lead tech." No new position was created, so no position was filled. There was no promotion or pay increase. There was, therefore, nothing to trigger the TRMC procedure for filling a vacant or new position. So, no application was appropriate or needed for the situation.

The Radiology Manager and the Radiologists are all familiar with the qualifications and work performance of the three CT Techs. Each of the three CT Techs was considered for these duties. Among the reasons that Darrell Beck was assigned these additional duties was his ability to expedite the patient schedule, his ability to interact effectively with the Radiologists and the radiology staff as well as the Medical Staff and other hospital departments, and his ability to communicate effectively with the patients and their families. Also among the reasons he was assigned these duties were your lack of demonstrated interpersonal skills, your demonstrated lack of respect and of cooperation with management at any level, and the fact that the needed skills for these duties assigned to Mr. Beck were not consistent with your demonstrated skills.

In review of the situation, I conclude that no notice or application procedure was triggered and that no discrimination or prejudice against you appears from the facts. I support the decision by Radiology Management to assign these duties to Darrell Beck.

Page 2

Signature *Frances Standridge*
Date: November 14, 2001 Division Head

months later. Your Honor, we cited case law in our motion for summary judgment that states that time frame will not establish a casual connection between the filing of the EEOC charge and the retaliation claim.

And then finally she has some allegations in regard to due process violations. In regard to the -- now I would like to back up and just go over them in a little bit more detail.

In regard to the freedom of speech claim that she has, she does not identify specifically what speech she is talking about, and we have addressed that issue several times with discovery, and that is required under the case law that we have cited in out motion for summary judgment, that she has to specifically identify the speech. However, what we have gleaned from her complaint --

THE COURT: I gather she is saying generally she feels she has a constitutional right to give opinons.

MS. TAUSCH: Correct.

THE COURT: And advice to patients?

MS. TAUSCH: And that's what we gleaned from her complaint as well, Your Honor. However, for the freedom of speech claim --

THE COURT: In other words, you are of the opinion not only does she have to generally give the category of the speech, but also exampled of when this took place with patient Jones --

[App 5 Q]

Tausch. Some of the employees were at lunch, on break, walking down the hall, or at other times when I believed they were not engaged in work related activities. The needed information was requested of all possible witnesses.

124. April 9th, 2002, I scanned a CT of the abdomen and pelvis on a patient that had been admitted through the night from the ER, that had been in a car wreck. Keith Moffett arrived that morning and helped me take the patient over to X-ray for a chest x-ray and transport, to take the patient up to his room. There was wasn't anyone in sight, when Jay the Radiology R. N. came from a room. I did not want to leave the patient unattended because I believed the patient had a fractured spleen and it was not uncommon for a patient to wait 30 minutes or more to be taken up to their room. Therefore, I ask the nurse to take the patient's vital signs and stay with the patient because I believed he had a possible fractured spleen.

125. April 10, 2002, Gene Lott gave me two different written final warnings in the presence of George Burns, that were dated April 9th. There was no discussion before he gave me the letters. As he handed me the letters he stated that "After your finish reading these, I need you to sign them, signing them doesn't mean that you agree or disagree, I just need you to sign them as acknowledgment that you received them."

126. The letters were not written on the standard counsel form with individual boxes describing the type of warning was receiving with the instructions regarding the proper

[App 5 R]

documentation procedure and a place for employee responses.

127. I stated I would sign them, but that I did not agree with them. Mr. Lott then said, "That's ok, you don't have to agree with it."

128. The letters were conclusory non specific factual statements and no explanation was offered. Attached to this affidavit is a true and correct copy of the letters dated April 9, 2002.

129. June 4th, 2002, I expressed my concerns to the ER physician about a CAT scan of the head, he had me scan earlier, after he told me the CAT scan report was called to him as normal. Dr. Cole admitted the patient then and ordered a MRI the next morning with the result, the patient had a 2.5 cm. pituitary tumor.

130. June 6th, 2002, upon the ER physicians request, I showed him the CAT scan on a 20 yr. old spanish man that spoke no English. The language barrier made it hard for him to assess, but the physician told me, he was interested in the appendix and asked me what measurement I got on the appendix. I told him, 1 .6 cm., of which he knew indicated a positive result. The scan was read as normal. The evening shift change between ER physicians left confusion, and the scan was repeated with the Lead CT tech Darrell Beck. His measurement was normal for an appendix and the scan was reported as normal a 2nd time. The patient was discharged, but returned the next day with a ruptured appendix and peritonitis, which required a long hospital stay due to the misdiagnosis.

[App 5 R]

THE PLAINTIFF: That was the week, the -- one was June 6 and one was June 4th

THE COURT: What was the other example?

THE PLAINTIFF: It was a CT of the brain I had done for the ER.

THE COURT: A what?

THE PLAINTIFF: And it was -

THE COURT: I couldn't understand you, what?

THE PLAINTIFF: It was a CAT scan of the brain.

THE COURT: CAT scan.

THE PLAINTIFF: That I done to the ER, and the radiologists had already gone for the day and the -- there was another case just prior to that that the doctor came over, was really hounding me about to talk to me about it.

THE COURT: Now who ... was this doctor?

THE PLAINTIFF: This was Dr. Cole. And I kept telling him I couldn't, you know, couldn't talk to him, and you know he just -- and anyway, he kept on and he left finally, because I was terrified. And before I left, I was getting ready to leave. Before I left I went to ask him did you ever, did he ever call you any results or report or whatever? And he said yes. And he said that the CT of the brain was normal.

Well, I knew there was a big question on it, that it wasn't normal, for sure wasn't normal, but exactly what was

[App 55]

going on I wasn't for sure, didn't really know, but I new it wasn't normal.

THE COURT: What did you do?

THE PLAINTIFF: Well, I felt pretty sick, and I stood there for about a minute and tried to decide what I was going to do because I didn't know what to do because I knew I was going to be fired.

THE COURT: I mean, did you, did you talk to –

THE PLAINTIFF: And I told him that it wasn't normal.

THE COURT: Excuse me?

THE PLAINTIFF: I told him that it wasn't normal.

THE COURT: Did you talk to the patient about it?

THE PLAINTIFF: No, no, no, no. I never talk to patients like that which they say I did, but I didn't.

THE COURT: So we are talking about two occasions, June 4th and June 6th of 2002?

THE PLAINTIFF: Yeah. And so the doctor on that put him in the hospital and did a scan on him the next day, an MRI, and he had a pituitary brain tumor.

THE COURT: Very well. Tell me about this solicitation issue. What was that about?

THE PLAINTIFF: Well, I don't think it was solicitation at all. It is not my interpretation of what solicitation is.

THE COURT: Tell me in your own words then what

[App 55]

TITUS REGIONAL MEDICAL CENTER
TITUS COUNTY MEMORIAL HOSPITAL
2001 N. Jefferson Mt. Pleasant, Texas 75455 903-577-6000
TITUS COUNTY EMERGENCY MEDICAL SERVICE
NORTHEAST TEXAS RURAL HEALTH CLINIC
TITUS REHABILITATION CENTER
CENTER FOR WOMEN'S HEALTH
COMMUNITY PRENATAL CLINIC
SKILLED NURSING FACILITY

[App 5 T]

TO: Joan Roberts
FROM: Gene Lott, Director of Human Resources
DATE: April 9, 2002
Concerning: Solicitation of Employees

We have been receiving complaints from employees in the hospital that you have been soliciting their involvement with your case while they are at work.

We cannot and will not tell you whom you can or cannot solicit but we can prohibit you from soliciting employees while you are on duty. Additionally, you cannot solicit employees that are on duty.

In other words, you cannot solicit anyone here at the hospital while you and/or they are working.

You should also remain in your work area unless it is necessary to leave the department on work related business.

This should be considered a final warning-any further violations of this nature could result in termination of employment.

JoanRoberts	*E.E. Lott*	*4-10-02*
Employee Signature	Management	Date

GL/cj
Copy to file

He would give excuse for them that I was rude and then complain that I needed to try harder to keep out patients on time. My job required me to give directives to get the work done, but if I was perceived aggressive in the least bit, I had no interpersonal skills. He perceived aggressiveness in Darrell as having the necessary interpersonal skills to be the Lead CAT scan technician. If I made a negative observation, I was not a team player whereas a negative observation by Darrell was an opinion.

119. New hire TCMH employees are not eligible for promotion or transfer for 6 months. Keith Moffett was hired in August of 2001 and could not have been considered for the Lead tech position as Frances Standridge stated in her response.

120. November 30, 2001 , I received an adverse performance evaluation. I responded in writing with a request for Mr. George Burns, if he could show, me some complaints made and the specific instances he is judging me on, that it would be most helpful. I never received an answer or any specifics.

121. I was heavily scrutinized daily.

122. December 11 , 2001 , I suffered a mental breakdown and was unable to go to work.

123. April 8th, 2001 , I sought information in the form of full names, addresses and phone numbers from various employees at various times. It was an unusually slow day, with nothing much to do. I had been requested to provide such information for all possible witnesses by the hospital attorney, Louise

[APP 5 U]

Tausch. Some of the employees were at lunch, on break, walking down the hall, or at other times when I believed they were not engaged in work related activities. The needed information was requested of all possible witnesses.

124. April 9th, 2002, I scanned a CT of the abdomen and pelvis on a patient that had been admitted through the night from the ER, that had been in a car wreck. Keith Moffett arrived that morning and helped me take the patient over to X-ray for a chest x-ray and transport, to take the patient up to his room. There was wasn't anyone in sight, when Jay the Radiology R. N. came from a room. I did not want to leave the patient unattended because I believed the patient had a fractured spleen and it was not uncommon for a patient to wait 30 minutes or more to be taken up to their room. Therefore, I ask the nurse to take the patient's vital signs and stay with the patient because I believed he had a possible fractured spleen.

125. April 10, 2002, Gene Lott gave me two different written final warnings in the presence of George Burns, that were dated April 9th. There was no discussion before he gave me the letters. As he handed me the letters he stated that "After your finish reading these, I need you to sign them, signing them doesn't mean that you agree or disagree, I just need you to sign them as acknowledgment that you received them."

126. The letters were not written on the standard counsel form with individual boxes describing the type of warning was receiving with the instructions regarding the proper

[App 5 U]

 [App 5 V]

S.W.2d 691, 694 (Tex.App.-El Paso 1991, no writ). Circumstantial evidence, and the reasonable inferences from such evidence, can prove the causal connection. *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 658 (Tex.App.–El Paso 1989, writ denied). Once the link is established, it is the employer's burden to rebut the alleged discrimination by showing there was a legitimate reason behind the discharge. *Hughes Tool Co. v. Richards*, 624 S.W.2d 598, 599 (Tex.Civ.App.–Houston [14th Dist.] 1981, writ ref'd n.r.e.), *cert. denied*, 456 U.S. 991, 102 S.Ct. 2272, 73 L.Ed.2d 1286 (1982).

Circumstantial evidence sufficient to establish a causal link between termination and filing a compensation claim includes: (1) knowledge of the compensation claim by those making the decision on termination; (2) expression of a negative attitude toward the employee's injured condition; (3) failure to adhere to established company policies; (4) discriminatory treatment in comparison to similarly situated employees; and (5) evidence that the Stated reason for the discharge was false. *Palmer v. Miller Brewing Co.*, 852 S.W.2d 57, 61 (Tex.App.–Fort Worth 1993, writ denied); *Montes*, 821 S.W.2d at 694-95; *Paragon Hotel Corp.*, 783 S.W.2d at 658.

903 S.W.2d at 77-78. Neither party has properly questioned these standards.[3] Whether one uses the Hinds standard or the standard articulated by the court of appeals, however, there is some evidence to support the trial, court's finding that Cazarez was fired in violation of section 451.001.

[12] Continental asserts that Cazarez was fired for violating the three-day rule. In *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 313 (Tex.1994) (per curiam), we held that, "[u]niform enforcement of a reasonable absence-control provision, like the three-day rule in this case, does not constitute retaliatory discharge."

The three day rule, in *Carrozza* was essentially identical to the three-day rule, in the present case. An employer who terminates an employee for violating such a rule cannot be liable for retaliatory discharge as long as the rule is uniformly enforced. This conclusion follows from our holding in *Hinds*. If an employee's termination is required by the uniform enforcement, of a reasonable absentee policy, then it cannot be the case that termination would not have occurred when it did but for the employee's assertion of a compensation claim or other conduct protected by section 451.001. Thus, if Continental enforced the rule uniformly, and if Cazarez violated it, then Cazarez could not have been terminated in violation of the Anti-Retaliation Law.

---

3. In a post-submission brief, Continental and Duff argue only, and for the first time, that under *Hinds* Cazarez should bear the burden of proving that her filing of a workers' compensation claim was the sole cause of her termination. Not only is that argument waved, it is also incorrect. We explicitly held in *Hinds* that under the Whistleblower Act, " the report need not be the employer's sole motivation, but it must be such that without it the discriminatory conduct would not have occurred when it did." *Hinds*, 904 S.W.2d at 631.

[13] The three-day rule did not apply while Cazarez was on compensation leave. Cazarez was released to return to work October 28, and she told Duff she would probably return November 1 or 4. Cazarez did not report to work or call in on either day. On November 5 Cazarez's son told Duffs assistant that his mother was still sick, and by Duff's admission, this satisfied the three-day rule. Duff testified that Cazarez did not report to work or call in on November 6, 7, or 8, and that he fired her on the 8th. However, Cazarez testified quite positively that Duff called her on November 7 to tell her that she had been terminated. Crediting Cazarez's testimony, as we must, there is some evidence that she did not violate the three-day rule.

He would give excuse for them that I was rude and then complain that I needed to try harder to keep out patients on time. My job required me to give directives to get the work done, but if I was perceived aggressive in the least bit, I had no interpersonal skills. He perceived aggressiveness in Darrell as having the necessary interpersonal skills to be the Lead CAT scan technician. If I made a negative observation, I was not a team player whereas a negative observation by Darrell was an opinion.

119. New hire TCMH employees are not eligible for promotion or transfer for 6 months. Keith Moffett was hired in August of 2001 and could not have been considered for the Lead tech position as Frances Standridge stated in her response.

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121. I was heavily scrutinized daily.

122. December 11 , 2001 , I suffered a mental breakdown and was unable to go to work.

123. April 8th, 2001 , I sought information in the form of full names, addresses and phone numbers from various employees at various times. It was an unusually slow day, with nothing much to do. I had been requested to provide such information for all possible witnesses by the hospital attorney, Louise

[App 5 W]

Tausch. Some of the employees were at lunch, on break, walking down the hall, or at other times when I believed they were not engaged in work related activities. The needed information was requested of all possible witnesses.

124. April 9th, 2002, I scanned a CT of the abdomen and pelvis on a patient that had been admitted through the night from the ER, that had been in a car wreck. Keith Moffett arrived that morning and helped me take the patient over to X-ray for a chest x-ray and transport, to take the patient up to his room. There was wasn't anyone in sight, when Jay the Radiology R. N. came from a room. I did not want to leave the patient unattended because I believed the patient had a fractured spleen and it was not uncommon for a patient to wait 30 minutes or more to be taken up to their room. Therefore, I ask the nurse to take the patient's vital signs and stay with the patient because I believed he had a possible fractured spleen.

125. April 10, 2002, Gene Lott gave me two different written final warnings in the presence of George Burns, that were dated April 9th. There was no discussion before he gave me the letters. As he handed me the letters he stated that "After your finish reading these, I need you to sign them, signing them doesn't mean that you agree or disagree, I just need you to sign them as acknowledgment that you received them."

126. The letters were not written on the standard counsel form with individual boxes describing the type of warning was receiving with the instructions regarding the proper

131. June 7th, 2002, I was overcome by gas fumes shortly after arrival to work and underwent emergency treatment and was sent home by the ER Doctor after breathing treatments.

132. June 12th, 2002, I wrote Dorothy Brightwell, the Director of Quality management a letter of reporting the toxic gaseous odor that permeated the CAT scan, ultrasound hallway, which sent me to the emergency room with breathing difficulties. My reported concern was, that patients weren't evacuated from the area, that ionizing equipment was still in operation which could have caused an explosion depending what the gas was, and that the ER staff was not alerted as to what the victims were exposed to, in order to give proper treatment. Attached to this affidavit is a true and correct copy of my letter to Dorothy Brightwell.

133. I do not believe asking for information is the same as solicitation. The hospital solicitation policy is not enforced in any aspect to my knowledge. Solicitation is a common practice and has been since I was employed there. The entire hospital solicits on a continual basis. Management is aware that it is because employees solicit to them. I believe the only reason I was written up for seeking that information was because it made employees aware of what the law was, since very few people knew about the law. The law was not posted as required. It only became posted after I was fired, even though I made them aware in the Whistleblower suit on February 7 , 2002 that it was not posted.

[App 5 W]

disregard for the health, welfare or safety of a patient. Actual injury need not be established under this clause."

39. March 6th, 2002, plaintiff became mentally unable to continue work.

40. Plaintiff was mentally unable to go to work March 7th and sought medical treatment from Dr. Van Buskirk.

41. March 7th, Dr. Aydelott and Dr. Davis wrote a letter of libel to Mr. Burns, Mr. Jacobson, Mrs. Standridge, Mr. Lott and all board members requesting termination of plaintiff. Plaintiff became aware of this letter through discovery. The events of the letter were never discussed with plaintiff.

42. March 11th, when plaintiff arrived at work at 9: 00 a.m. there was a meeting held with Mrs. Standridge, Mr. Burns, Mr. Beck and Mr. Moffett, excluding plaintiff. Plaintiff contends this meeting was held in a manner, with the obvious intent to intimidate plaintiff.

43. March 25th, 2002, Dr. Aydelott and Dr. attended the hospital board meeting to request plaintiff be terminated.

44. April 8th, 2001, plaintiff sought information in the form of full names, addresses and phone numbers from various employees at various times. Plaintiff had been requested to provide such information for all possible witnesses by the hospital attorney, Louise Tausch, in Discovery, for the Whistleblower lawsuit.

[App 5 X]

45. April 9th, 2002, plaintiff scanned a CT of the abdomen and pelvis on a patient that had been admitted through the night from the ER, that had been in a car wreck. Keith Moffett arrived that morning and helped plaintiff take the patient over to X-ray so transport could take the patient up to his room. There were no transports and plaintiff did not want to leave the patient unattended because she believed the patient had a fractured spleen and it was not uncommon for a patient to wait 30 minutes or more to be taken up to their room. Therefore, plaintiff requested the radiology nurse, Jay Young R.N., to take the patient's vital signs and stay with the patient because she believed he had a possible fractured spleen.

46. April 10, 2002, Gene Lott gave plaintiff two different written final warnings in the presence of George Burns, that were dated April 9th. There was no discussion before he gave plaintiff the letters. As he handed plaintiff the letters he stated that "After your finish reading these, I need you to sign them, signing them doesn't mean that you agree or disagree, I just need you to sign them as acknowledgment that you received them."

47. The letters were not written on the standard counsel form with individual boxes describing the type of warning plaintiff was receiving with the instructions regarding the proper documentation procedure and a place for employee responses.

48. Plaintiff stated she would sign them, but that she did not agree with them. Mr. Lott then said, "That's ok, you don't have to agree with it."

[App 5 X]

49. One letter stated:

a. We have been receiving complaints from employees in

you were on call. As a result we have had to contact Keith or Darrell to come in for the necessary procedures. Please understand each one of you is responsible for on-call duties and each of you have the requirement to fulfill those duties.

d. The other issue involves you diagnosing patients' problems after they undergo procedures that you performed. Several patients have made complaints in reference to you giving them medical advice. It is not your job nor is it in your scope to diagnose or recommend patient treatment. This type of behavior needs to cease immediately.

51. June 4th, 2002, plaintiff expressed her concerns to the ER physician about a CAT scan of the head, he had her scan earlier, when he told her the CAT scan report was called to him as normal. Dr. Cole admitted the patient then and ordered a MRI the next morning with the result, the patient had a 2.5 cm. pituitary tumor.

52. June 6th, 2002, upon the ER physicians request, plaintiff showed him the CAT scan on a 20 yr. old spanish man that spoke no English. The language barrier made it hard for him to assess, but the physician told plaintiff, he was interested in the appendix and asked her what measurement she got on the appendix. She told him, 1 . 6 cm., of which he knew indicated a positive result. The scan was read as normal. The evening shift change between ER physicians left confusion, and the scan was repeated

[App 5 X]

with the Lead CT tech Mr. Beck. His measurement was normal for an appendix and the scan was reported as normal a 2nd time. The patient was discharged, but returned the next day with a ruptured appendix and peritonitis, which required a long hospital stay due to the misdiagnosis.

53. June 7th, 2002 plaintiff was overcome by gas fumes shortly after arrival to work and underwent emergency treatment and was sent home by the ER Doctor after breathing treatments.

54. June 12th, 2002, plaintiff wrote Dorothy Brightwell, the Director of Quality management a letter, reporting the toxic gaseous odor that permeated the CAT scan, ultrasound hallway, which sent plaintiff to the emergency room with breathing difficulties. Plaintiff's concern was, that patients weren't evacuated from the area, that ionizing equipment was still in operation which could have caused an explosion depending what the gas was, and that the ER staff was not alerted as to what the victims were exposed to, in order to give proper treatment.

55. June 14, 2002, plaintiff was called into George Burns' office at the end of her shift and handed a letter of termination from Gene Lott. The letter stated:

a. On April 10th 2002, you received two different written final warnings. The subject areas covered in that counseling were solicitation of employees, on call responsibility and diagnosing patients' problems and giving them medical advice.

b. Since that meeting on April 10, 2002, you have violated

[APP 5 X]

action for which redress is provided arises under the United States Civil Rights Act of 1964, ("Title VII") Article 42 U.S.C. § 2000e2 because the suit is a Civil Action for Unlawful Employment Practices. Federal Question jurisdiction is conferred on this Court by 28 U.S.C. 1331 and 28 U.S.C. 1343 (a) 3 because it is a Civil Action arising under the laws and Constitution of the United states.

C. Exhaustion of Administrative Procedure

5. Plaintiff timely filed with the Equal Employment Opportunity Commission (EEOC) a charge of discrimination against defendant. Plaintiff received a notice of the right to sue from the EEOC within 90 days of filing this complaint. A copy of the notice of the right to sue is attaches as Exhibit A.

D. FACTUAL BACKGROUND

6. Plaintiff is an employee within the meaning of Title VII and belongs to a class protected under the statue, namely female.

7. Defendant is an employer within the meaning of Title VII.

8. Plaintiff contends Mr. George Burns intentionally discriminated against plaintiff creating an abusive and hostile work environment based on sex in violation of Title VII.

9. George Burns conduct unreasonably interfered with plaintiff's work performance. Specifically, his conduct was severe and pervasive in treating plaintiff in a disparate discriminatory manner, compared to her two male co-workers.

[App 5 X]

10. Plaintiff's workplace was both objectively and subjectively hostile.

11 . Plaintiff contends the hostile work environment based on her gender was rooted in defendant, Mr. Burns', sex stereotyped set of beliefs and expectations as evidenced by his treatment of plaintiff.

12. As far back as the first week of September of 1992, Mr. Burns demonstrated his unwillingness accept plaintiff as being credible and make excuse for her two male co-workers when she complained to him that her two male co-workers, Mike Dalton and David Mogish, were spending the majority of their time on break outside the building and not doing there part in the CAT scan work schedule; leaving her to carry their share of the work with little or no assistance.

13. Mr. Burns held a meeting with the three techs after plaintiff completed her days work that night and told plaintiff that it was none of her business what her male co-workers were doing, that she was not their boss.

14. Plaintiff broke down upon arrival to work the following morning and received counsel from Jackie Martin, the TCMH social worker, who investigated and told plaintiff that Mr. Burns had full administrative support from Administration and they wanted to hear no problems out of her, so she advised her to seek outside counsel and take time off.

15. Plaintiff was off work for 2 months and received counsel.

16. Mr. Burns had full undisciplined control over plaintiff with administrations approval and he used this fact in a purposeful taunting manner to incite plaintiff, by her exclusion [App 5X]

in his communication of departmental matters to include her male co-workers, thus demonstrating his control over her.

17. Plaintiff contends Mr. Burns would not take what she said as being credible, even with explanation, when he expected and pressured her to film soft tissue and bone windows at the same time on bone related CAT scans, which was not possible; finally months later Mike Dalton informed Mr. Burns the machine would not allow plaintiff to film both at the same time.

18. Mr. Burns belittled and would not take plaintiff seriously when she requested training on a new heart nuclear medicine procedure no one had experience in performing and for which she was responsible for performing, in the spring of 1993. Plaintiff took her vacation time and set up training for herself in San Antonio at a heart center and bought books at her own expense.

19. Mr. Burns expected her to train another technician to perform CAT scans on call in two days and he wouldn't take her seriously when she tried to explain it was an impossible task.

20. Mr. Burns created a Technical Coordinator position for X-ray in November of 1997 and designated Mr. Adam Larson to this position without posting the position and allowing women of more experience or seniority to apply; Mr. Burns also created a Lead Ultrasound position the same way and designated Mr. Terri Rossie to that position.

21. Plaintiff filed a grievance against Mr. Adam Larson when he slandered plaintiff to male transportation aids in February

[App 5 X]

U.S. 658 (1978); Myers v. Hasara, 26 F. 3rd 821, 825, 628 (7th Cir. 2000)]

65. Mr. Lott and Mr. Burns were acting under color of the laws and regulations of the state of Texas and the Titus County Memorial Hospital when Mr. Burns through his biased understanding and selectively limited interpretation of the ARRT Code of Ethics number six, formulated a policy which was adopted by management and first promulgated to plaintiff on March 5th, 2002. This new departmental policy prohibited plaintiff from speaking out as a patient advocate, in the relaying of privileged pertinent information she attained through observation and communication; to the attending physicians with care, discretion and judgment. This was accomplished by Mr. Lott and Mr. Burns taking an adverse employment action against plaintiff with her termination on June 14, 2002. Plaintiff challenges the ARRT Code #6 and/or Mr. Burns' policy formulated by his interpretation of ARRT Code #6 as being written facially unconstitutionally vague as applied to plaintiff, or and/or on behalf of all x-ray technologists, when enforced as a rule, with a penalty of termination from employment. The policy fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited or guidelines for the enforcer to prevent arbitrary enforcement, therefore inhibiting not only speech but association. The exercise of these established policies and customs resulted in the violation of plaintiff's right of free speech and association. [42 U.S.C.~ § 1983; Lugar v. Edmonson

[App 5 X]

Case No. _____

IN THE
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JOAN ROBERTS
Petitioner

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TITUS COUNTY MEMORIAL HOSPITAL; GEORGE BURNS, Director of Radiology Titus County Memorial Hospital; GENE LOTT, Director of Human Resources Titus County Memorial Hospital

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PROOF OF SERVICE

I, JOAN ROBERTS, do swear or declare that on this date, September 27, 2005, I have served on each party to the above proceeding, Petitioner's corrected APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI, as required by Supreme Court Rule 29 by certified U. S. Mail, return receipt requested, properly addressed and prepaid to Jeffery C. Lewis, attorney in charge for Titus County Memorial Hospital; George Burns, Director of Radiology Titus County Memorial Hospital; Gene Lott, Director of Human Resources, Titus County Memorial Hospital and whose address is 1710 Moores Lane, P. O. Box 5517, Texarkana, Texas, 75505-5517, telephone (903) 792-8246.

Joan Carol Ellis Roberts, Pro Se
Joan Carol Ellis Roberts
65 C.R. 1044
Mt. Pleasant, Texas, 75455
(903)572-9667

No. 05-427

IN THE

SUPREME COURT OF THE UNITED STATES

JOAN ROBERTS,
Petitioner

v.

TITUS COUNTY MEMORIAL HOSPITAL;
GEORGE BURNS, Director of Radiology,
Titus County Memorial Hospital;
GENE LOTT, Director of Human Resources,
Titus County Memorial Hospital

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

Joan Carol Ellis Roberts, Pro Se
65 C.R. 1044
Mt. Pleasant, Texas 75455
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STATEMENT AND ARGUMENT OF THE CASE

The Defendant moved for summary judgment "pursuant to Rule 56 of the Federal Rules of Civil Procedure" claiming "there are no genuine issues as to any material fact as to the claims asserted by the Plaintiff." (Record on Appeal at 1311, hereafter ROA). Petitioner's 3rd Am. Pet. stated claims for unjustified governmental intrusion on her – and others not before the court – speech as a patient advocate, including reports of acts of health care negligence in the interest of patients, due to a facially vague and standardless or sufficiently subjective departmental policy known as Code #6; and/or as applied. (ROA at 1119-1120, 1128 -1129, 1131-1132, 1136-1137). Petitioner's 3rd Am. Pet. also stated claims for unjustified governmental intrusion on her speech in pursuit of a Texas Whistleblower Act claim, through the arbitrary enforcement of a Hospital solicitation policy with view-point discrimination. (ROA at 1128, 1143-1144). Petitioner's alternative pleading under the pretext of these two policies, pled she was terminated in retaliation for her prior reports to Hospital officials of the Hospital's violations of law relating to competitive bidding procedures in the purchase of a CAT scan machine (ROA at 1137 -1138) and previously filed reports/EEOC charges of sex discrimination (ROA at 1166-1168). Petitioner submitted her affidavit testimony of her specific speech as it relates to her claims with supportive documents. (ROA at 1542-1543, 1559-1561).

Petitioner's 3rd Am. Pet. pled that in addition to due process rights based on these federal based rights, she had a substantive due process right, for all of which she was denied procedural due process and discharged without constitutionally adequate safeguards. (ROA at 1148-1150). Petitioner brought forth the Hospital By-laws as the binding criteria she was a "for cause" employee with an enforceable expectation of continued public employment, set forth in practice through the conduit of the Board's definitively defined disciplinary standards contained in

the employee handbook (ROA at 1586, 1349) and her affidavit testimony alleging an unfair termination process. (ROA 1546-47).

In addition, Petitioner pled facts in support of a Title VII hostile work environment claim of disparate treatment because of her sex, rooted in her Director's prejudice and sex based stereotyped set of beliefs and expectations (ROA at 1153-1161), and submitted her affidavit (ROA at 1541-1565) testifying to numerous detailed accounts of disparate treatment to include stray remarks and evidence of her Director's subjective, discretionary promotion system creating a statistical disparity as it pertained to women. (ROA at 1592; App. Br. 13-19).

Petitioner stated objections in her response (ROA at 1494-1506) and at oral argument (ROA Vol. 10 at 33) to the mischaracterization (ROA at 1308-1343) of the pleadings and the failure to respond.

The issue before this Court is did the Courts below abuse their discretion in deciding this case, err as a matter of law in weighing the evidence, changing the evidence, and making credibility determinations on the disputed fact issues that go to the heart of this case, described below, causing improper judgments; and accordingly was Petitioner intentionally discriminated against and denied equal protection of the law because she is pro se.

Petitioner's Count 1 and her testimony, claim her speech and interest as a patient advocate in reporting her concerns of medical negligence are worthy of First Amendment protection, outweighing the Hospital's interest in protecting a "code of silence", because such a code does not promote the efficiency in its public services. (ROA at 1139-40, 1561). The Fifth Circuit in *Kinney v. Weaver.* No. 00-40557-CV (4-15-04) stated, "*this court* has recognized, the First Amendment interest in protecting speech about official misconduct is also a governmental interest, and there are circumstances in which that interest outweighs any other governmental interest that may be implicated. ... This case is by no means the first time that this court has recognized the existence of a 'code of silence'... enforcing such a 'code of silence' is not a legitimate interest

because it does not promote the efficiency of public services... *this court* has also recognized the great First Amendment significance of speech regarding misconduct of public officials... the dissent does not mention that the subject matter of Kinney's and Hall's speech was official misconduct, much less official misconduct as grave as... the dissent further minimized the First Amendment interest at stake in this case by characterizing it as solely Kinney's and Hall's interest... individuals working in [hospitals] 'are often in the best position to know' about the occurrence of official misconduct... 'it is essential' that individuals such as [Roberts] 'be able to speak out freely' about [physician negligence]... particularly [negligence] that is as serious as [misdiagnosing appendicitis or a pituitary tumor]... [to term Roberts' speech as misconduct] appear[s] to be employing euphemisms for a 'code of silence' prohibiting..." reports of negligence. *Kinney, Id.* at 44-48.

As in *Kinney,* both Courts minimized or ignored the claims and the First Amendment interest at stake and asserted Roberts was "providing diagnoses to patients and giving unsolicited diagnoses to doctors" and credited such disputed legal conclusions as true. (C. Pet. App. 2 at 10; App. 1 at 7). When asked in oral argument, whether Roberts talked to patients in such a manner, she unequivocally stated, "NO. NO, NO, NO. I NEVER TALK TO PATIENTS LIKE THAT, WHICH THEY SAY I DID, BUT I DIDN'T." (ROA Vol. 10 at 28). The District Court concluded Roberts' actions were equated as making diagnoses and practicing medicine (C. Pet. App. 2 at 10 -11), when she recognized and notified an emergency room attending Doctor he had received an incorrect authoritative normal report of a brain CAT scan, which became verified as incorrect the following day by an authoritative report of the patient's MRI scan (ROA at 1131;1561). In oral argument the Hospital did not dispute the facts of Roberts' conversations with the ER Doctors on June 4th and June 6th. (ROA Vol. 10 at 39; ROA 1561). The characterization of Roberts' actions is a genuine material fact issue and the Courts have committed a cognizable error of law causing reversible harm.

The District Court several times cited and stated *nonexistent* fact information in the record to support its opinion as follows: (1) Petitioner alleges the "4-9-02" letter of counsel – entitled concerning recent problems – "violated her free speech rights as a patient advocate", but the 3rd Am. Pet. named the 3-4-02 letter (C. Pet. App. 2 at 8); (2) Petitioner alleges the "3-4-02" letter of counsel "violated her free speech rights as a patient advocate" when it "ordered her to discontinue activities of diagnosing patients", but the letter stated no such warning (C. Pet. App. 2 at 8) and; (3) "alleges she was retaliated against for exercising her free speech relating to the solicitation policy, making medical diagnoses, and giving medical advice", when the Court's cited record states the exact opposite and confirms she denied the basis of such claims (C. Pet. App. 2 at 31).

The District Court also, asserted material facts as true that the record clearly disputes (ROA 1118-1180; 1479-1694) without citing to the record as follows: (1) "Plaintiff claims she has a constitutional right to diagnose and give medical advice…". (C. Pet. App. 2 at 2); (2) "Because the Court has found that Plaintiff's speech relating to the solicitation policy, making medical diagnosis and giving medical advice…". (C. Pet. App. 2 at 31); (3) "… Plaintiff claims to have in giving her opinions regarding medical advice." (C. Pet. App. 2 at 31) and; (4) "Plaintiff was soliciting employees and diagnosing patients' problems and giving them medical advice…". (C. Pet. App. 2 at 33-34). According it made a legal conclusion inferred from disputed facts not in evidence (C. Pet. App. 2 at 11). The Court also, changed the substantive form of a material document when it altered the form of Petitioner's 3-4-02 letter of counsel promulgating Code #6 as policy, when it transposed the original word "them", which in the context of the sentence related back to "physicians", with the word "patients". (C. Pet. App. 2 at 5).

Both Courts found *Southern Christian Leadership Conference v. Supreme Court of State of La.* 252 F. 3d 781, (5th Cir. 2001) controlled Count 1. That case is not on point because the policy in question did not regulate or prohibit speech directly, or implicate speech of

public concern, or punish speech, the policy was content neutral, the attack was on the enactment of the policy and not the implementation, and no forum existed, thus it was error to base this case on *Southern Christian* and cite no authority on point that employee speech about reports of cognizable medical negligence are not matters of concern.

In the Count 1 facial challenge the Defendant failed to make a showing or meet the required elements of a facial challenge to a vague policy curtailing prospective employee speech, tellingly the District Court argued the case. (ROA at 1311-1312; 1319-1325; C. Pet. App. 2 at 5-8). "[W]here a vague statue 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms'"; accordingly the Code #6 policy clearly abuts speech in the interest of the patient. *Grayned v. City of Rockford*, 408 U. S. 104, 110 (1972). Neither Court applied the rule of law to the Defendant's required burden to a facial challenge in the present context to "show that the interests of both potential audiences... present and future employees" engaging in speech as a patient advocate "are outweighed by that expression's necessary impact of the speech on the Hospital's actual operation". *United States v. National Treasury Employees Union*, No. 93-1170 (1995); (C. Pet. App. 2 at 5-8; App. 1 at 5-6). The Appeals Court did not apply the rule of law for *both independent* reasons a policy can be found vague in a facial challenge, it did not analyze whether the policy's lack of definitive standards encouraged arbitrary enforcement. (C. Pet. App. 1 at 5-6). Both Courts tellingly ignored the pleadings.

In the Count 1 pretext claim, the Courts found whistleblower speech was an activity protected by *law*. (C. Pet. App. 2 at 13-14; App. 1 at 7-8). The District Court referenced no authority directing the Court, commanding Petitioner's remedy for her injury as contingent upon the impossible burden of proving Defendant's pretextual conclusory charges were a matter of public concern, charges alleged to be libelous and illegitimate are genuine issues of material fact since Petitioner emphatically testified to the contrary. (App. R. Br. 5-8). (C. Pet. App. 2-31). "In pretext cases, 'the issue is whether

either illegal or legal motives, but not both were the "true" motives behind the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989). The Appeals Court did not address this pretext claim. (C. Pet. App. 1). Whistleblower activities are protected by law and, "If state may not interfere with or prohibit activity itself, it may not regulate discussion relating to that activity." USCA Con. Amend. 1 – *Valley Family Planning v. State of N.D.*, 489 F. Supp. 238, 243 (1980).

In the Count 2 viewpoint discrimination claim, described above, the Defendant failed to move on or negate as a matter of law the required elements in defense of the policy's implementation. (ROA at 1311-1312; 1319-1325). The District Court tellingly argued Defendant's case, exercising a power it does not possess as the *Hospital* is to "satisf[y] its ultimate burden of persuasion"... "which always remains on the moving party". *Celotex Corp. v. Catrett*, 477 U. S. 317, 331 (1986); (C. Pet. App. 2 at 15-18).

The District Court found the speech element of the alleged solicitation was of public concern, but the alleged solicitation conduct was not. (C. Pet. App. 2 at 13; App. 1 at 7). The Appeals Court agreed, but did not apply this finding to the view-point discrimination claim. (C. Pet. App. 1 at 7-8). Neither Court cited to any authority governing liability for the implementation of a policy directing speech and non-speech elements combined in the same course of conduct in a non-public forum; accordingly the Courts judgment was arbitrary, and unprincipled. (C. App. 2 at 15-18).

The District Court cited and stated a *nonexistent* fact in the record to support its opinion as follows: Petitioner "alleges the Defendants' policy regarding solicitation violated her freedom of speech"; however, the 3rd Amended Petition alleged the policies implementation, not the policy. (C. Pet. App. 2 at 12; ROA 1143-44). Then it asserted a legal conclusion of a material element as true that is in dispute and did not cite to the record as follows: "In prohibiting Plaintiff's solicitation activities, however, Defendants acted to preserve the purpose of the Hospital's business in treating patients." (C. Pet. App. 2 at 17). The Courts further failed

to recognize the 4-9-02 solicitation letter did not state the activity was disruptive to the *business of treating patients*. (App. Br. 46-47).

In the Count 3 due process claim, the District Court found the Hospital Administrator fired Petitioner (ROA Vol. 10 at 10; ROA at 1349) while the Appeals Court contradicted the District Court and stated he did "not" (Cert. Pet. App. 1 at 5), as a basis to support the judgment in favor of the Hospital's rebuttal argument that the Hospital By-laws directing the Administrator to only "dismiss any employee for good cause" (ROA at 1586), accordingly could "not even apply to her employment termination". (Br. of App. at 18).

Neither Court cited authorities based on rights grounded in a local By-law, but instead based their decision only on cases governing "policies" or "contracts". (Cert. Pet. App. 1 at 3-5; App. 2 at 18-23). To approach a case in this manner is to ignore the Supreme Court, "[j]udicial decisions do not stand as binding 'precedent' for points that were not raised, not argued and hence not analyzed." *Legal Services Corp. v. Velazquez, et. al.*, U.S. No. 99-603 (Feb. 2001) (App. Br. at 25). The District Court determined that a By-law must be "reference[d] ... in an employment contract" and cited no authority on point with this arbitrary conclusion. (Cert. Pet. App. 2 at 22).

The Court of Appeals as directed by *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976) determined "we look to state law" and cited Texas cases "imposing a strong presumption in favor of at-will employment"; however, the Court ignored state law, in Texas, "if a general provision conflicts with a special or local provision..., the special or local provision prevails as an exception to the general provision, unless the general provision is the latter enactment...". Tex. Gov't. Code §311.026(a)(b). (App. Mot. Reh. at 5). It is not *reasonable* to determine a By-law is equated in weight with a policy. Nor is a By-law an "ambiguous employment polic[y]". (Cert. Pet. App. 1 at 4). It is only rational according to Texas law to conclude that a By-law can be the basis of a legitimate claim that is more than a unilateral expectation of due process rights and constitutes evidence as a matter of law in the absence of other documentary

or authoritative evidence to the contrary (ROA at 1308-1409). The procedural due process claims are undisputed that she was denied a fair and impartial hearing, specific information of the charges and no post appeal process was available. (ROA at 1308-1409).

In Count 4, both Courts erred in analyzing Petitioner's Title VII hostile work environment claim as stated in her 3rd Amended Petition, detailed above, solely as a failure to promote claim. (C. Pet. App. 2 at 23-29; App. 1 at 9). Both Courts stated, "Title VII addresses only 'ultimate employment decisions'" and accordingly Petitioner's claim must fail; thus they ignored *Green v. Administrators of the Tulane Ed. Fund*, 284 F. 3d 642 (5th.Cir. 2002) recognizing a hostile work environment can be tangible without economic harm. (C. Pet. App. 1 at 9; App 2 at 25). The Appeals Court found Roberts had "a mixed record for interpersonal relationships" (C. Pet. App. 1 at 2), but tellingly turned around and found it a "valid nondiscriminatory reason" negating discrimination. (C. Pet. App. 1 at 9).

In Count 5, the Appeals Court tellingly found there was a "dearth of evidence demonstrating any sort of pretext" to justify a claim for Title VII retaliation. (C. Pet. App. 1 at 10). Petitioner's response record consisted of 215 pg. disputing the reasons in the 6-14-02 letter as untrue and not legitimate, creating material fact issues (ROA 1479-1694). The District Court found 6 months between the EEOC claim of 12-18-01 and firing of 6-14-02 was to long to support an inference of intent (C. Pet. App. 2 at 33). The Courts ignored the record shows documentary evidence of adverse counsels dated 1-8-02, 3-4-02, two dated 4-9-02 and letters from alleged co-conspirators dated 4-1-01 & 3-7-02 that are subjects of a libel suit recently remanded for trial, are more than a dearth. (ROA 1573, 1595-97, 1622, 1623, 1615-16, 1601); *Roberts v. Davis*, No. 06-04-0057 CV, Tex. App. - Texarkana (March 15, 2005) Pet. D., Mot. Reh. D.

The District Court asserted material fact issues as true that are in dispute (ROA 1118-1180; 1479-1694) without citation to the record to substantiate their opinion, as follows: (1) "Plaintiff nevertheless was terminated on June 14, 2002, for refusing to follow her employer's

instructions...". (C. Pet. App. 2 at 33) and; (2) "Plaintiff's termination was based on her failure to follow the orders of her employer." (C. Pet. App. 2 at 34). The 6-14-02 letter testifies differently. (ROA 1587, App. R. Br. 24).

The numerous errors of law and abuses in discretion are valid and caused reversible harm which any unbiased Court could pick out. "Courts are constitutionally founded, independent, and impartial adjudicative tribunals constituted to hold and exercise judicial power which emanates directly from the Constitution." *Galbraith v. Lenape Regional High School Dist.*, 964 F. Supp. 889, 894 (D.N.J. 1997). "The Supreme Court has warned that at summary judgment, '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...' *Anderson v. Liberty Lobby, Inc.* 477 US. 242, 255 (1986)." *Berry v. Baca*, No. 03-56000, 9th Cir. (2004).

The 5th Cir. in *Kinney* turned for the plaintiff, a case with the same similarities as briefed above, except it was not a pro se case, has 4 counts, and consist of 66 pgs. (appox. 27 lines per pg.), whereas this case has 5 counts & 4 alternative pleadings, is pro se, and consist of 10 pgs. (appox. 24 lines per pg.). *Kinney, Id.* In *Hopson v. Quitman County*, No. 96-60582, 5th Cir. (1997) a case alleging termination in violation of the Family & Medical Leave Act and a Hospital policy, for which District Court Judge Folsom sitting by designation from the Eastern District of Texas, wrote the opinion, who was the same Judge as in this case at bar. The *Hopson*, opinion consist of 241 lines of text and the case at bar 224 lines, the summary judgment was reversed because the Court found "whether Hopson was insubordinate and failed to report to work... are genuine issues of material fact" as well as "whether *Hopson* made a reasonable effort... not to disrupt unduly the operations of the hospital." *Hopson , Id.* The case at bar alleged libel, retaliation upon retaliation and discrimination. (3rd Am. Pet.) The Courts decision does not conform to the precedent, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in

his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

Petitioner has not seen an "impartial judiciary" and any person of reasonable intelligence could infer from the record that it is because she is pro se. The fact those cases were published and this case is not, also supports this inference. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Art. XIV. The abridgment of Roberts' equal protection under the law as a pro se litigant is intentional as the Courts contradictions are a denial of facts they already knew, consider those above and below.

"Plaintiff's claim of violation of her right to free speech under Count 1 and 2 of the Third Amended Petition fails as Plaintiff's speech was a matter of personal opinion and benefit, not a matter of public concern" (Cert. Pet. App. 2 at 35), but concluded, "[t]he Court recognizes that Plaintiff had in mind the best interest of her patients and the Hospital when she attempted to assist patients and doctors... and when she filed her Whistleblower lawsuit." (Cert. Pet. App. 2 at 34). The Court also stated, "Accordingly, the Court finds that based on the *content form and context of statements provided by plaintiff* in pursuit of a Texas Whistleblower Act claim, ... Thus, Plaintiff's statements in pursuit of her Texas Whistleblower Act claim *can be* fairly considered as relating to matters of... concern to the community." (Cert. Pet. App. 2 at 13). (emp. added). Yet, the Court found in its conclusion, "Plaintiff failed to identify specific "speech" which she believes was protected." (C. Pet. App. 2 at 35).

The Court should use its impartial discretion and reverse.

Respectfully submitted,

Joa Carol Ellis Roberts

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Case No. 05-427

IN THE
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TITUS COUNTY MEMORIAL HOSPITAL; GEORGE BURNS, Director of Radiology Titus County Memorial Hospital; GENE LOTT, Director of Human Resources Titus County Memorial Hospital

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CERTIFICATE OF COUNSEL

I, JOAN ROBERTS, do swear or declare that on this date, DECEMBER 2, 2005, that Petitioner's Motion For Rehearing is presented in good faith and not for reasons of delay.

Joan Carol Ellis Roberts, Pro Se
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